No. 00 339 AUG 29 2000

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In The Supreme Court of the United States

ANNIE KELLY, et al.,

Petitioners,

v.

AL FURAT PETROLEUM COMPANY,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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Questions Presented

1. What must a corporation prove to establish that it is an "organ of a foreign state" entitled to immunity under the Foreign Sovereign Immunities Act 28 U.S.C. §1603 *et seq.*?

2. What discovery is a plaintiff entitled to conduct pertaining to facts relevant to a defendant's claim to be an agency or instrumentality of a foreign state?

3. Can a private corporation be a majority owned agency or instrumentality of a foreign state when it is fifty percent owned by an agency or instrumentality of a foreign state and fifty percent owned by private interests?

4. Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §1605(a)(2), what legal analysis should be followed by state and federal courts to determine whether a claim is "based upon" commercial activity in light of this Court's ruling in *Saudi Arabia v. Nelson*, 507 U.S. 379 (1993)?

LIST OF PARTIES

The parties to the proceeding below are as follows:

1. Annie Kelly
   Plaintiff/Petitioner

2. Jeannette Carpenter
   Plaintiff/Petitioner

3. Kathy Strong, Ind. and a/n/f John Strong
   Plaintiff/Petitioner

4. Al Furat Petroleum Company
   Defendant/Respondent

5. Syria Shell Development B.V.
   Defendant

6. N.V. Koninklijke Nederlandshe Petroleum Maatschappij a/k/a Royal Dutch Petroleum Company
   Defendant

7. The "Shell" Transport and Trading Company p.l.c.
   Defendant

The Petition for Writ of Certiorari challenges only the Court of Appeals judgment in favor of Al Furat Petroleum Co. Petitioners are not challenging the judgment in favor of the other Defendants.

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IN THE SUPREME COURT OF THE UNITED STATES
October Term, 2000

PETITION FOR WRIT OF CERTIORARI

Petitioners, Annie Kelly, Jeannette Carpenter, and Kathy Strong, Individually and as next friend of John Strong, a Minor, respectfully pray that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion on appeal to the United States Court of Appeals for the Fifth Circuit affirming the judgment of the district court is reproduced as Appendix A and is reported at 213 F.3d 841 (5th Cir. 2000).

The Memorandum and Recommendation on Defendants' Motion to Dismiss entered by United States Magistrate Judge Mary Milloy on February 26, 1998, is reproduced as Appendix B. United States District Judge Vanessa Gilmore adopted Magistrate Milloy's recommendation on March 31, 1998.

Magistrate Milloy's Order on Plaintiffs' Motion to Compel Discovery and to Delay Rulings on Defendants' Motions to Dismiss is reproduced as Appendix C. Judge Gilmore adopted this Order on March 31, 1998.

JURISDICTION

Petitioners file this Petition for Writ of Certiorari seeking review of a judgment and opinion entered by the Fifth Circuit Court of Appeals on May 31, 2000. No petition for rehearing was filed. This Court has jurisdiction over this Petition pursuant to 28 U.S.C. §1254(1).

FEDERAL STATUTE INVOLVED

This case involves construction of §§1603 and 1605 of the Foreign Sovereign Immunities Act. The relevant sections are set out verbatim below:

28 U.S.C. §1603

For the purposes of this chapter-

(**a**) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(**b**) An "agency or instrumentality of a foreign state" means any entity-

> (**1**) which is a separate legal person, corporate or otherwise, and
>
> (**2**) which is an organ of a foreign state or political subdivision thereof, or a majority of

whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

28 U.S.C. §1605(a)(2)

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case -

(2) in which the action is based upon a

commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

STATEMENT OF THE CASE

This is a wrongful death case raising questions regarding the construction of the Foreign Sovereign Immunities Act. 28 U.S.C. §1603 *et. seq.* (hereafter "FSIA") Martin Kelly, Joseph Carpenter and Danny Strong were burned to death on June 10, 1995 while working at the ISB-123 well in Syria. (R. Vol. 3: 1678, Vol. 2: 1764, Vol. 2: 1899). Respondent Al Furat Petroleum Co. ("Al Furat"), as operator of the well, had complete custody of the well site at ISB-123. (R.Vol. 2: 1765).

Kelly, Carpenter and Strong were working in Syria pursuant to two contracts between Al Furat Petroleum and two Texas companies. Initially, Al Furat contracted with Wright Boot's & Coots for Wright Boots & Coots to perform well control services on the leaking well. (Vol. 3: 1679-80, 1690-1719). This contract was performable in both Syria and in the United States. More specifically, in the contract Al Furat gave Wright Boots & Coots authority to act as its agent to obtain goods and services from American providers for the well control operations. (Vol. 3: 1679, 1696). Wright Boots &

Coots under the direct control and authority of Al Furat and acting as their agent, contracted with other American companies for equipment and supplies to be delivered to Syria from Houston and other exit ports in the United States (Vol.3: 1679, 1683-88; Vol.9: 433-41).

In accordance with requests from Syria, John Wright of Wright, Boots & Coots requested that James Tuppin of Boots & Coots L.P put together a team of individuals to perform well control and firefighting services for Al Furat. (Vol. 3: 1679). Tuppin selected Kelly, Carpenter and Strong to perform the well control services. (Vol.3: 1679). Thereafter, Al Furat entered into a separate agreement with Boots & Coots L.P.. This agreement was also performable in both Syria and the United States. More specifically, Al Furat agreed to provide indemnity to Boots & Coots for any claims arising from personal injury and further agreed to pay all amounts due under the contract to Boots & Coots L.P in Houston, Harris County, Texas. (R. Vol 3: 1721).

Annie Kelly and Jeanette Carpenter filed suit in Texas state court seeking damages for the deaths of their husbands against Al Furat Petroleum Company and others. (R. Vol. 8: 127-37). Kathy Strong filed a separate state court proceeding against Al Furat and the other defendants also seeking damages for the death of her husband Danny Strong (R. Vol. 10: 20-40). Asserting federal subject matter jurisdiction under 28 U.S.C. §§1332(a) and 1441(b)(d), the Defendants removed both cases to the United States District Court for the Southern District of Texas. (R. Vol. 8: 143-54, Vol. 10: 44-55). Al Furat then filed a motion to dismiss based upon its contention that it was immune from suit under the FSIA. (R. Vol. 8: 184-87, Vol. 10: 113-16). As support for its motion Al Furat filed the declaration of Terje Olson which contended that Al Furat was

a private non-profit making non-asset owning corporation incorporated under Syrian law. (R. Vol.10: 275). According to Al Furat, it was owned fifty percent by Syria Petroleum Company ("SPC") and fifty percent by two private entities: Syria Shell (31.25%) and Deminex Syria GmbH (18.75%). (R. Vol. 10: 275). SPC, according to Al Furat's evidence, is a company wholly owned by the government of Syria. (R. Vol. 10: 196). Al Furat also filed motions to stay discovery until after the Court's ruling on its Motions to Dismiss. (R. Vol. 9: 401-07 Vol. 5: 1056-59).

After the motions were filed but before they were decided, the two cases were consolidated into one proceeding. (R. Vol. 5: 1026-31, Vol. 9: 510). The Court held its scheduling conference on December 5, 1997. (R. Vol. 11). Plaintiffs, prior to and following the scheduling conference, filed motions to conduct and compel discovery. (R. Vol. 9: 331-34, Vol. 3 1479-81, 1568-81). Defendants resisted these motions on the grounds asserted in their Motions to Stay Discovery. (R. Vol. 9: 374-80, Vol. 3 1553-63, 1593-1647). The trial court referred both the discovery motions and the motions to dismiss to United States Magistrate Mary Milloy. (R. Vol. 6: 631). Magistrate Milloy denied Plaintiffs' motions to conduct discovery and granted Defendants' motions to stay discovery in an order dated February 24, 1998. (R. Vol.2: 1838-67, Appendix C). In a memorandum and recommendation dated February 26, 1998, Magistrate Milloy recommended dismissal of the Plaintiffs claims as to Al Furat and the other Defendants. (R. Vol. 2: 1868-1900, Appendix B).

Plaintiffs filed timely objections to both orders, (R. Vol. 2: 2029-36, 2037-48), and the trial court adopted both orders on March 31, 1998. (R. Vol. 2: 2096-97). Thereafter, the trial court entered final judgment on June 23, 1998. (R. Vol.

1: 2153).

Plaintiffs appealed these decisions to the Fifth Circuit Court of Appeals, and the Fifth Circuit affirmed the orders of the district court in an opinion dated May 31, 2000. (Appendix A).

REASONS FOR GRANTING PETITION FOR CERTIORARI.

This Court should grant this petition for certiorari because the court of appeals has entered a decision which conflicts with *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000) regarding the construction of a federal statute (Question Presented No. 4); because the case presents other issues which require the court to resolve a separate conflict between the Seventh Circuit Court of Appeals and the Ninth Circuit Court of Appeals regarding construction of the same federal statute (Question Presented No. 3); and because the court of appeals has decided important questions of federal law that have not been but should be settled by this Court (Questions Presented Nos. 1 and 2).

Each of these issues of statutory construction involve the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §1603 *et. seq.* Specifically, this case presents issues regarding the proper definition of the term "organ of a foreign state" in §1603(b)(2); questions regarding the majority ownership requirements of an agency or instrumentality of a foreign state as defined in 28 U.S.C. §1603(b)(2); and questions regarding the applicability of the Commercial Activities exception set out in 28 U.S.C. §1605(a)(2).

I. What Must A Corporation Prove To Establish That It Is An "Organ Of A Foreign State Entitled To Immunity Under The Foreign Sovereign Immunities Act 28 U.S.C. §1603 *et seq.*?

The court of appeals affirmed the dismissal of the Plaintiffs' claims against Al Furat for lack of subject matter jurisdiction on the grounds that Al Furat was an agency or instrumentality of a foreign state and therefore immune from liability under the FSIA. Section 1603(b) defines the term "agency or instrumentality of a foreign state." At issue in this case is subparagraph two of §1603(b), which states that an agency or instrumentality of a foreign state means any entity "which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interests is owned by a foreign state or political subdivision thereof."

The court of appeals decided that Al Furat was entitled to immunity based upon its determination that Al Furat was an organ of a foreign state. (Appendix A: 14-15). In reaching this conclusion, the court acknowledged that there was no clear test for determining what an organ of a foreign state was. (Appendix A: 11). Other courts have reached the same conclusion. *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078, 1084 (9th Cir. 1999); *Supra Medical Corp. v. McGonigle*, 955 F.Supp. 374, 378-79 (E.D. Pa. 1997). A comparison of the Fifth Circuit's opinion in this case with the opinions of other courts discussing organ status reveals the need for this Court to fashion a clearer test for determining whether an entity is an organ of a foreign state.

In this case, the court of appeals applied the five factors set out in *Supra Medical Corp. v. McGonigle*, 955 F.Supp. 374,

379 (E.D. Pa. 1997) to determine that Al Furat was an organ of a foreign state. (Appendix A: 11). In doing so, however, it stated that the factors were only a "helpful framework" and stated further that it would not apply the factors "mechanically" or require that all the factors support an organ determination. (Appendix A: 12). In *Supra Medical*, the court set out the five relevant factors as to an entity's status as an organ of a foreign state as follows:

1. whether the foreign state created the entity for a national purpose;

2. whether the foreign state actively supervises the entity;

3. whether the foreign state requires the hiring of public employees and pays their salaries;

4. whether the entity holds exclusive rights to some right in the country; and

5. how the entity is treated under foreign state law.

Supra Medical, 955 F.Supp. at 379.

In the absence of a clear test as to what constitutes an organ of a foreign state and in view of the court of appeals' determination that not all five factors are required to support organ status, numerous questions arise as to how the factors should be applied. These questions include:

1. Are any of the factors absolutely determinative as to organ status?

2. Are any of the factors more important or less important than others in the determination of organ status?

3. How many factors are required to be satisfied in order for an entity to obtain organ status?

4. What standard of proof should apply to an entity seeking to prove these factors?

In addition to questions regarding application of the *Supra Medical* factors, other questions arise regarding what facts are sufficient to satisfy the various factors. Indeed, a review of the four courts of appeals' decisions discussing the meaning of the term "organ of a foreign state" reveals that there is a wide disparity among the courts as to the facts required to satisfy the various factors. This is particularly true with regard to the active government supervision factor and the public employees factor.

Excluding the court of appeals' decision in this case, three circuit court cases have discussed the meaning of the term "organ of a foreign state" during the last five years. *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.2d 1078 (9th Cir. 1999); *Corporacion Mexicana v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996); *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995). Each of these cases have contained a more extensive analysis of the facts relating to active government supervision as well as imposed a higher threshold of government supervision than was imposed by the court of appeals in this case.

In *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), the issue was whether the Alberta Pork Development

Corporation was an organ of a foreign state. On the active supervision issue, the Ninth Circuit noted that the government of the province of Alberta approved the plans submitted by pork producers to start the Alberta Pork Development Corporation; that the Alberta government had authority to authorize Alberta Pork to issue regulations applicable to producers; that the Alberta government had authority to require Alberta Pork to furnish information to it; that the Alberta government had a right of approval over all of Alberta Pork's regulations; and that government regulations prevail over Alberta Pork's regulations when they conflict. On this basis, the court of appeals determined that the Alberta government did exercise an active supervisory role over Alberta Pork and that Alberta Pork was an organ of a foreign state.

In *Corporacion Mexicana v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996), the issue was whether Pemex Refining Company was an organ of the state of Mexico. The court noted that all eight directors of Pemex were appointed by Mexico's federal executive; that four of the eight directors were actually members of the federal government; and that Mexico's federal government had the right of approval over Pemex Refining's acquisitions and shares. After noting that Pemex Refining was entirely owned by the Mexican government and entirely controlled by government appointees, the court of appeals concluded that Pemex was an organ of a foreign state. *Corporacion Mexicana*, 89 F.3d at 655.

In *Alpha Therapeutic Corp. v. Nippon Hoso Kyokai*, 199 F.3d 1078 (9th Cir. 1999), the issue was whether NHK, the Japanese public broadcasting company, was an organ of a foreign state. The court of appeals conducted an extensive analysis of the facts relating to active government supervision and found that NHK was an organ of a foreign state. In

reaching this conclusion, the court relied on the following facts pertaining to the government's supervision of NHK: (1) the government required that NHK programming satisfy government mandated goals; (2) the Japanese prime minister, with the approval of Japan's Diet, appointed all twelve members of NHK's board of directors; (3) a Japanese government minister supervised the board and reviewed the budget annually; (4) NHK's budget was also subject to approval by the Japanese Diet; (5) if the Diet failed to approve the budget, then programming on NHK could continue only with the approval of a Japanese government minister; (6) that a Japanese government minister must adopt and approve all amendments to the articles of incorporation which govern NHK's operations; (7) NHK's operations were limited to the statutory purpose set out in the Japanese Broadcast Law; and (8) NHK was not allowed to earn profits or carry commercials. *Alpha Therapeutic Corp.*, 199 F.3d at 1084. Thus, the court in *Alpha* determined that NHK was a organ of a foreign state, but that determination was based on an extensive review of the facts regarding the government's control over NHK.

In contrast to these cases, the court of appeals in this case conducted virtually no analysis on the supervision issue and imposed a very lax definition of active government supervision. The court found that the active government supervision factor was satisfied solely based upon the fact that SPC appointed four of the eight Al Furat directors, including the chairman of the board, and that those directors have been high-level government officials (Appendix A: 14). The court of appeals did not discuss Syria's control over Al Furat's policies and procedures, its budget or finances, or its operations. Moreover, in view of the fact that the board is comprised of one half SPC appointed directors and one half

private directors, the court of appeals did not discuss whether the publicly appointed directors exercised any more or less of a supervisory role over Al Furat than the privately appointed directors. Indeed, there was no evidence before the trial court and no discussion by the court of appeals as to what role Al Furat's directors played in supervising and controlling Al Furat.

A comparison of the Fifth Circuit's opinion in this case with *Gates*, *Corporacion*, and *Alpha Therapeutic* must leave litigating parties with many questions as to the meaning of the active government supervision factor of the organ of a foreign state test. These cases provide no clear understanding regarding what kind of government supervision is required to make an entity and organ of a foreign state. All that is apparent is that government entities have a better chance of prevailing on their immunity defenses in cases filed in the federal courts within the Fifth Circuit, than they do in cases filed in federal courts within the Ninth Circuit. This disparity contravenes Congress' express desire that the FSIA provide a uniform body of law concerning the amenability of foreign sovereigns to suit in the United States. *First Nat'l City Bank v. Banco Para El Comercio Exterior*, 462 U.S. 611, 622 n.11 (1953).

There is also confusion regarding the importance and application of the public employees factor. Prior to this case, the only circuit court case to discuss the public employees factor was *Corporacion Mexicana v. M/T Respect*, 89 F.3d 650 (9th Cir. 1996). In that case, the court in determining that Pemex Refining was an organ of a foreign state, noted that it employed only public servants. *Corporacion Mexicana*, 89 F.3d at 655.

Two district courts have also considered the defendant's use of public employees as part of their analysis. In *Intercontinental Dictionary v. De Gruyter*, 822 F.Supp. 662

(C.D. Cal. 1993), the court in finding that Australian National University was an organ of a foreign state noted that its employees were paid by the Australian government. *Id.* at 673. In *Supra Medical Corp. v. McGonigle*, 955 F.Supp. 374 (E.D. Pa. 1997), the district court found that the United Medical and Dental School of Guys and St. Thomas' Hospitals were not organs of the United Kingdom. In reaching this conclusion, the court noted that there was no evidence that the government required defendants to hire public employees. *Id.* at 379.

Similarly, in this case there is no evidence that Syria's government required Al Furat to use public employees. Nevertheless, the court of appeals found the public employee factor satisfied based on the fact that Syrian Petroleum Corporation had the right to appoint four of Al Furat's eight directors, and that these directors were high-level government officials. (Appendix A: 14). Thus, the means of satisfying the public employees factor remains highly uncertain. *Corporacion* and *Intercontinental Dictionary* held that an entity's employment of solely public employees supported a finding of organ of a foreign state status. In this case, the employment of merely four public employees was sufficient. This wide diversity as to the factual requirements for satisfying the public employee factor creates even more uncertainty in the determination of what relevance the use of public employees plays in deciding whether an entity is an organ of a foreign state.

In sum, the court of appeals may have understated the proposition when it held that there is no clear test for the determination of whether an entity is an organ of a foreign state. In reality, there is no test at all. While the factors set out in *Supra Medical Corp.* may serve as a useful list of inquiries, the courts below have failed to clearly enunciate which of the

factors are most important and how many need to be satisfied for an entity to obtain organ of a foreign state status. Moreover, the courts have failed to provide any guidance regarding what facts are required to support application of these factors. As a result, neither litigants nor courts can have any precedential-based understanding of what is required to satisfy the active government supervision and public employee factors of the organ of a foreign state test. The definition of "organ of a foreign state" is an important question of federal law which should be decided by this Court. For this reason, this Court should grant this Petition for Writ of Certiorari so that it may develop a workable definition for the term "organ of a foreign state" as it is used in the FSIA.

II. What Discovery Is A Plaintiff Entitled To Conduct Pertaining To Facts Relevant To A Defendant's Claim To Be An Agency Or Instrumentality Of A Foreign State?

In addition to clarification as to what constitutes an organ of a foreign state, this Court should also clarify what discovery is allowed on that question. Clarification is needed from this Court so that courts below can substantially protect a sovereign defendant from the burdens of litigation while, at the same time, giving plaintiffs a meaningful opportunity to respond to assertions of immunity. As shown in the previous section, the determination of whether an entity is an organ of a foreign state is necessarily a factually intensive one. The court has to inquire and the parties have to offer proof as to the control of the corporation exercised by the government; the control exercised by private entities over the company asserting immunity; the purpose of the company; whether the employees

of the company are public or private; what exclusive rights or privileges are held by the company; and how the company is treated by the laws of the state for whom it claims to be an agency or instrumentality.

These inquiries can most truthfully be satisfied by allowing the party opposing immunity to ask questions and view documents pertaining to the purpose of the company, its control by governmental and private entities as well as its rights, privileges and status under foreign law. However, the courts of appeals have been hesitant to allow discovery on immunity questions because of their concern that such discovery would interfere with the defendant's claimed immunity. *See In re Papandreou*, 139 F.3d 247 (D.C. Cir. 1998)(noting that sovereign immunity is immunity from trial and the attendant burdens of litigation); *First City, Texas v. Rafidain Bank*, 150 F.3d 172, 176 (2nd Cir. 1997)(holding that allowing discovery in FSIA cases requires the court to perform a delicate balancing between permitting discovery to substantiate exceptions to immunity and protection of defendant's claim to immunity); *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir. 1992)(holding that discovery on immunity issues should be ordered circumspectly and only to verify facts crucial to an immunity determination).

As a result of this circumspection, plaintiffs and the courts are often left merely to accept the defendant's word regarding immunity facts and are deprived of an opportunity to test immunity allegations by cross-examination. That is what happened in this case. Al Furat filed a declaration of its operations manager, Terje Olsen, stating that Al Furat was fifty percent owned by SPC; that SPC had the right to appoint four of the eight members to Al Furat's board; and that those board members were invariably high-level Syrian government

officials. The declaration referred to various documents such as the governmental decree by which Al Furat was formed and the Al Furat by-laws which could well have provided relevant information regarding issues of control, but those documents were not provided to the court. Instead, the declarant merely summarized those portions of the documents which supported Al Furat's case.

The plaintiffs were not allowed either to view the documents or depose the declarant. (Appendix C: 14-15). The result of this denial of discovery was that the district court determined that Al Furat was an organ of a foreign state based solely on Mr. Olsen's statement that it was formed by governmental authorization decree to develop identified petroleum resources in Syria and on his statements regarding the ownership of the company and SPC's appointment of half of Al Furat's board of directors. There was no evidence before the court of Syria's control over Al Furat because the Plaintiffs did not have a chance to develop it in discovery, and Al Furat chose not to present any. Likewise, there was no evidence that Al Furat used public employees; that Al Furat held an exclusive right to some privilege in the country;[1] or that Al Furat was

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1 While Mr. Olsen's affidavit stated that Al Furat's objective was to develop identified petroleum reserves within the Syrian Arab Republic, there is no evidence to suggest that Al Furat's rights in this regard were exclusive. Remarkably, Al Furat asked the court to infer that its rights were exclusive based upon the fact that Syrian Petroleum Corp. had the right to handle all the works relating to the discovery and exploration of petroleum reserves in Syria. Despite the fact that Al Furat had control over all of the evidence on this question and refused to participate in discovery so as to allow the Plaintiffs access to it, the court of appeals nevertheless indulged in the inference that Al Furat's right was exclusive. Thus, the court of appeals ignored the equally plausible inference

treated as an organ of a foreign state under Syrian law.

This case therefore presents the question as to what discovery should be permitted in cases where the party seeking immunity alleges that it is an organ of a foreign state. Organ status necessarily involves factually intense inquiries. If the court leans too far toward the concept of protecting a defendant claiming immunity from the burdens of litigation, then the playing field becomes unlevel and plaintiffs' claims become subject to dismissal based solely on affidavit testimony from interested witnesses.

In this case, the courts below failed to resolve this question in any clear way. The trial court disallowed discovery based upon its finding that Al Furat had made a *prima facie* showing that it was an organ of a foreign state. (Appendix C: 14-15). Thus, the trial court declined discovery on control issues which were critical to Al Furat's organ status on the grounds that Al Furat's status as an organ of a foreign state protected it from such discovery. In reaching this conclusion, the trial court engaged in circular reasoning and likewise failed to consider the factors from *Supra Medical Corp. v. McGonigle*, 955 F.Supp. 374, 378-79 (E.D. Pa. 1997), which it said it was applying.

The court of appeals avoided the discovery issue altogether by holding that the Plaintiffs failed to exercise diligence in seeking this discovery. (Appendix A: 17-22). More specifically, the court of appeals held that the Plaintiffs failure to attempt discovery prior to being advised that a recommendation on dismissal was imminent deprived Plaintiffs

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that Syrian Petroleum Corporation owned other companies in addition to Al Furat which also fulfilled the purpose of developing oil and gas resources within the nation of Syria.(Appendix A: 14-15).

of their right to complain about the lack of discovery on appeal. This holding is remarkable when it is considered in light of the following facts:

1. The trial court set a discovery deadline of August 1, 1998. (R. Vol. 3: 1484). Thus, Plaintiffs still had five months in which to conduct discovery at the time the trial court granted the Defendants' motions denying discovery.

2. The Defendants had requested that discovery would be stayed and indicated that they would oppose every attempt at discovery prior to a ruling on their dismissal. (R. Vol. 9:401-07, Vol. 5:1056-59, R. Vol. 4:1255-63, R. Vol. 3:1568-81, R. Vol.3:1552-63).

3. The Plaintiffs responded to these stay requests by filing motions to conduct and compel discovery. (R. Vol. 9: 331-34, Vol. 3: 1479-81, 1568-81).

4. The Plaintiffs had in fact noticed a deposition prior to being informed of the court's imminent recommendation regarding dismissal. (R.Vol. 3: 1553-54). This notice was met with an objection by the Defendants. (R. Vol. 3: 1552-63).

5. The Plaintiffs asked on the record for Mr. Olsen's deposition and the Defendants refused

on the record to produce him for deposition. (R. Vol. 3: 1572).

6. The magistrate who denied discovery asked for and received a list of subjects on which the Plaintiffs wanted discovery prior to denying Plaintiffs' motion for discovery (R. Vol. 3: 1589-92).

7. In a thirty page opinion denying discovery, the magistrate never once stated that the Plaintiffs failed to use diligence in seeking discovery. (Appendix C).

Plaintiffs sought to address the discovery issues in the court below by responding to the Defendants' motion to stay discovery prior to sending discovery requests and notices which were sure to be met with an objection. The trial court granted the Defendants' motion to stay discovery on the merits and not because Plaintiffs had waived the right to conduct discovery by not initiating formal requests. Despite the trial court's failure to find a waiver, the court of appeals totally avoided the issue by stating that the Plaintiffs had not exercised due diligence in conducting discovery. Thus, the court of appeals analysis was singularly unhelpful in setting out parameters for discovery in FSIA cases.

This Court therefore needs to level the playing field in the resolution of factual issues pertaining to immunity. This can be accomplished only by setting parameters which more clearly provide Plaintiffs with opportunities to conduct discovery on factual issues pertaining to a Defendant's status as an agency or instrumentality of a foreign state. Discovery

needs to be allowed when Defendants claim to be an organ of a foreign state and issues of control remain unresolved. Likewise, discovery should be allowed when the Defendant claims it is majority owned by a foreign state but fails to show clear majority ownership. In cases such as this one, where a Defendant is only fifty percent owned by an agency or instrumentality of a foreign state, but claims other aspects of control give it effective majority ownership, then the Plaintiffs should be allowed discovery to ascertain whether such control exists.

The need for such discovery is even more apparent when viewed against the standard of proof imposed on a defendant asserting immunity. Under current law, a defendant asserting immunity bears the burden of persuasion on the immunity issue. However, if it makes a *prima facie* case for immunity, then the burden shifts to the plaintiff to show that the defendant is not entitled to immunity. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994); *HR. Rep. No.*, 94-1487, at 17 (1976), *reprinted in* 1976 U.S.C.C.A.N. 6604, 6616.

A plaintiff who is allowed no discovery cannot go forward with evidence pertaining to immunity because the defendant has control of all that evidence and plaintiff has no means of getting it from the defendant. Thus, a defendant can make his *prima facie* case for immunity by filing an affidavit of an interested witness. In doing so, he passes the burden of going forward with the evidence to the plaintiff. Without discovery, however, the plaintiff has no means of bearing that burden because he has no access to evidence regarding the defendant's immunity.

Without parameters to allow a plaintiff to conduct discovery regarding facts pertaining to immunity, plaintiffs will

be deprived of their right to respond to defendant's immunity assertions. This, in turn, can only result in dismissal of a case against a defendant whose immunity defense is supported only by the statements of an interested witness which are unsupported by documentation and untested by cross examination. This Court should therefore grant this Petition for Writ of Certiorari to clarify a plaintiff's discovery rights against a defendant asserting factually intensive immunity claims under the Foreign Sovereign Immunities Act.

III. Can A Private Corporation Be A Majority Owned Agency Or Instrumentality Of A Foreign State When It Is Fifty Percent Owned By An Agency Or Instrumentality Of A Foreign State And Fifty Percent Owned By Private Interests?

In addition to questions regarding the meaning of the term "organ of a foreign state", this case also presents questions regarding the majority ownership clause of §1603(a)(2)'s definition of agency or instrumentality of a foreign state. Section 1603(a)(2) provides agency or instrumentality status to an entity which is an organ of a foreign state or "a majority of whose shares or other ownership interests is owned by a foreign state or political subdivision thereof". In this case, Al Furat was not majority owned by the Syrian government, but was instead only fifty percent owned by Syrian Petroleum Corporation, a corporation wholly owned by the Syrian government. Thus, this case presents two issues under §1603(a)(2)'s majority ownership clause:

1. whether a company owned by an agency or instrumentality of foreign state is itself an

agency or instrumentality of a foreign state; and

2. if so, whether fifty percent ownership can be considered majority ownership.

A. Does The FSIA Allow For Indirect Ownership Of An Agency Or Instrumentality?

The question of whether a corporation which is indirectly owned by a foreign state through an intervening agency or instrumentality of a foreign state is itself an agency or instrumentality of a foreign state has been the subject of a conflict between the Ninth Circuit and Seventh Circuit Courts of Appeals. In *Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-63 (9th Cir. 1995), the Ninth Circuit held that entities owned by an agency or instrumentality of a foreign state are not themselves agencies or instrumentalities of a foreign state entitled to FSIA immunity. The Seventh Circuit reached a contrary conclusion in *In re Air Crash Disaster near Roselawn, Indiana*, 96 F.3d 932, 939-41 (7th Cir. 1996), holding that majority ownership by an agency or instrumentality of a foreign state confers upon the owned entity agency or instrumentality status. Because it decided that Al Furat was an organ of a foreign state, the Fifth Circuit did not reach the issue in this case.

In *Gates*, the defendant asserting immunity (Fletcher) was a wholly owned subsidiary of a corporation (Alberta Pork Producers Development Corporation) which was determined by the court to be an agency or instrumentality of the province of Alberta. Fletcher claimed FSIA immunity based on the fact that it was owned by a corporation which was an agency or

instrumentality of the government of Alberta. The Ninth Circuit rejected this argument. The court recognized that Alberta Pork was protected by the FSIA as an agency or instrumentality of a foreign state since it was directly controlled by the Alberta government. *Id* at 1461. However, it held that Fletcher was not immune because it was owned by an agency or instrumentality of a foreign state rather than by a foreign state itself. *Id.* Relying on the statutory language in §1603(b)(2) requiring an agency or instrumentality of a foreign state to be owned by a "foreign state or political subdivision thereof," the court held that the FSIA would not protect a corporation which was owned by an agency or instrumentality of a foreign state. In reaching this result, the court concluded that to hold otherwise would contravene congressional intent in an area in which Congress had written carefully. *Id.* at 462.

In deciding that entities which are owned by agencies or instrumentalities of a foreign state are not themselves agencies or instrumentalities of a foreign state, the *Gates* court considered the definition of foreign state in Section 1603(a).[2] The court concluded that construing that definition to allow for indirect ownership by foreign states of agencies or instrumentalities would contradict the remainder of the statute which carefully differentiates between foreign states, political subdivisions, and agencies or instrumentalities of foreign states. The court noted:

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2 Section 1603(a) provides: a "foreign state," except as used in Section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

> If Congress had intended "agencies or instrumentalities of a foreign state" to mean "a foreign state" for the purposes of Section 1603, then it would also have intended "a political subdivision" to mean "a foreign state" because Section 1603(a) defines a foreign state as including both "a political subdivision of a foreign state or an agency or instrumentality of a foreign state". The statutory language strongly indicates that Congress did not intend this interpretation, however, because the remainder of the section differentiates between "foreign states" and "political subdivisions thereof."
>
> For example, Section 1603(b)(2) provides that the entity must be "an organ of a foreign state or a *political subdivision thereof*" or a majority of its shares must be owned by a "foreign state or *political subdivision thereof*".

Gates 54 F.3rd at 1462. (emphasis in original). Based upon Congress' continual and deliberate differentiation between the terms "foreign state" and "political subdivision thereof" the court concluded that Congress could not have intended the Section 1603(a) definition to apply to the use of the term foreign states in §1603(b)(2).

The Court of Appeals for the Seventh Circuit reached the opposite conclusion in *In re Air Crash Disaster near Roselawn, Indiana*, 96 F.3rd 932 (7th Cir. 1996). In that case, the court rejected *Gates* based upon the definition of foreign state in Section 1603(a). In view of that definition, the court held that construing §1603 as it was construed in *Gates* would be the equivalent of rewriting the law as the court preferred rather than as Congress intended. *Air Crash Disaster*, 96 F.3rd

at 940.[3]

This case presents the Court with the opportunity to resolve the conflict between the Seventh and Ninth Circuit Courts of Appeals. Under the present state of the law, and assuming SPC's fifty percent ownership constitutes majority ownership, Al Furat is an agency or instrumentality of a foreign state in the states encompassed by the Seventh Circuit but is not an agency or instrumentality in the states encompassed by the Ninth Circuit. Thus, this Court should grant this Petition

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3 The Ninth Circuit and the Seventh Circuit Courts of Appeals are the only circuit courts which have substantively addressed this issue. Other, lower federal courts and state courts have also discussed the question. *Hyatt Corp. v. Stanton*, 945 F.Supp. 675 (S.D.N.Y. 1996); *Gardiner Stone Hunter v. Iberia Lineas Aereas*, 896 F.Supp. 125 (S.D.N.Y. 1995); *Martinez v. Dow Chemical Co.*, 1996 WL502461 (E.D.La. 1996)(following *Gates*); *Linton v. Airbus Industrie*, 934 S.W.2d 754 (Tex. App. - Houston [14th Dist.] 1996, writ denied, (following *Aircrash Disaster*). In addition to these cases, other cases have assumed without discussing that the FSIA permits indirect ownership. *Pere v. Nuovo Pignone, Inc.*, 150 F.3d 477 (5th Cir. 1998); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995); *Linton v. Airbus Industrie*, 30 F.3d 592, 598 n.29 (5th Cir. 1994); *Allendale Mut. Ins. Co. v. Bull Data Systems*, 10 F.3d 425 (7th Cir. 1993); *O'Connell Machinery Co. v. M/V Americana*, 734 F.2d 115, 116 (2nd Cir. 1984); and *Ebrahim v. Shell Oil Co.*, 847 F.Supp. 65, 67 (S.D. Tex. 1994)(holding that Al Furat was an agency or instrumentality of a foreign state without discussing the indirect ownership issue). This question has also been the subject of numerous legal articles. Jane H. Griggs, Note, *International Law - The Foreign Sovereign Immunities Act; Do Tiered Corporate Subsidiaries Constitute Foreign States?*, 20 W. New Eng. L. Rev. 387, 403-18. Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 Ga. L. Rev. 1121 (1997); Kelly Shaul, Comment, *Tiered Entities and Sovereign Privileges Under the Foreign Sovereign Immunities Act*, 34 San Diego L. Rev. 1817 (1997).

for Certiorari to resolve this issue, and to effect a uniform construction of the FSIA in all state and federal courts.

B. Is Fifty Percent a Majority?

If indirect ownership is sufficient to convey agency or instrumentality status on indirectly owned entities, the question then arises in this case as to whether fifty percent ownership is sufficient to constitute majority ownership. Dictionary definitions make clear that fifty percent is not a majority.[4] In the courts below, Al Furat relied on the phrase "other ownership interests" in §1603(b)(2) to ague that its fifty percent ownership was in reality majority ownership.[5]

This raises another question of statutory construction of the Foreign Sovereign Immunities Act. Does the phrase "other ownership interests" allow courts to disregard the objective numerical majority calculation in favor of an inquiry into the intangible aspects of governmental control of a corporation, or does "other ownership interests" merely refer to entities (such as partnerships, associations, and other non-corporate entities) whose ownership is measured by something other than shares of stock? This Court should hear this case in order to determine how the phrase "other ownership interest" impacts the numerical majority provisions of 28 U.S.C. §1603(b)(2).

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4 Both Black's Law Dictionary and Webster's define "majority" as a number greater than half of any total. *Black's Law Dictionary* (5th Ed. 1979), p. 860; *Miriam Webster's Collegiate Dictionary* (10th Ed. 1997), p. 702.

5 Section 1603(b)(2) grants agency or immunity status to an entity "a majority of whose shares or other ownership interests is own by a foreign state or political subdivision thereof".

IV. Under The Foreign Sovereign Immunities Act Of 1976, 28 U.S.C. §1605(a)(2), What Legal Analysis Should Be Followed By State And Federal Courts To Determine Whether A Claim Is "Based Upon" Commercial Activity In Light Of This Court's Ruling In *Saudi Arabia v. Nelson*, 507 U.S. 379 (1993)?

If an entity is found to be a foreign state as defined by §1603, it can still be subject to liability for claims falling within the statutory exceptions to immunity. One such exception is the Commercial Activities exception, which removes immunity in cases "in which the action is based upon a commercial activity carried on in the United States by a foreign state." 28 U.S.C. §1605 (a)(2)(1994). This Court has not considered the FSIA's Commercial Activities exception since its 1993 decision in *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993).

In *Nelson*, the court held that a suit is based upon a commercial activity when that activity encompasses necessary elements of a plaintiff's claim. *Nelson*, 507 U.S. at 357. Since *Nelson*, courts of appeals have struggled with the application of this Court's definition of the phrase "based upon" in applying the Commercial Activities exception. The struggle to apply the *Nelson* test is exemplified by the Fifth Circuit's holding in this case and its conflict with the Ninth Circuit's holding in *Sun v. Taiwan*, 201 F.3d 1105 (9th Cir. 2000).[6] In this case, the court ruled that the Petitioners' claims were not "based upon" Al Furat's commercial activities in the United States despite the fact that the Plaintiffs were alleging that Al Furat breached

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6 Petitioners believe that Taiwan will be filing a Petition for Writ of Certiorari in this case on or before August 31, 2000.

duties which were created by contracts Al Furat entered into with entities in the United States. In *Sun*, the Ninth Circuit ruled that the plaintiff's claims were based upon Taiwan's commercial activities in the United States when those claims stated that Taiwan breached duties to disclose information which such duties were created by Taiwan's tour promotion activities in the United States. In both cases, duties were created by the defendants' activities in the United States and their commerce with U.S. citizens. However, in *Kelly* such claims were held not to be based on a commercial activity and in *Sun* such claims were held to be based on a commercial activity. This Court should therefore grant this Petition to resolve the conflict between this case and *Sun* and to refine its definition of the phrase "based upon" so to assist the courts of appeals to effect a consistent application of the Commercial Activities exception to the Foreign Sovereign Immunities Act.

CONCLUSION

The conflicts among the courts of appeals regarding the construction of the Foreign Sovereign Immunities Act have undermined Congress' desire to develop a uniform body of law concerning the amenability of foreign sovereigns to suits in the United States' courts. The appellate courts have not adequately defined the term "organ of a foreign state", nor have they developed proper procedures for orderly development of facts regarding that issue. Further, the courts of appeals remain in conflict as to the requirements of the majority ownership provision of §1603(b)(2) and the Commercial Activities exception in §1605(a)(2). Resolution of these issues by this Court would substantially advance the development of a uniform body of law regarding foreign sovereigns in United

States courts.

For these reasons, Petitioners pray that this Court grant this Petition for Writ of Certiorari and reverse the judgment of the Fifth Circuit Court of Appeals in this cause.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Fifth Circuit
Dated May 31, 2000

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 99-20095

ANNIE KELLY, JEANETTE CARPENTER,

Plaintiffs-Appellants,

versus

SYRIA SHELL PETROLEUM DEVELOPMENT
B.V., ET AL.,

Defendants,

SYRIA SHELL PETROLEUM DEVELOPMENT B.V.;
AL FURAT PETROLEUM COMPANY;
N.V. KONINKLIJE NEDERLANDSCHE PETROLEUM
MATSENAPPIJ; ROYAL DUTCH PETROLEUM;
THE SHELL TRANSPORT AND TRADING COMPANY,

Defendants-Appellees.

KATHY STRONG, Individually and as
Next Friend of John Strong, a minor,

Plaintiff-Appellant,

versus

SYRIA SHELL PETROLEUM DEVELOPMENT
B.V, ET AL.,

Defendants,

SYRIA SHELL PETROLEUM DEVELOPMEN B.V.;
AL FURAT COMPANY; N.V. KONINKLIJE
NEDERLANDSCHE PETROLEUM MATSENAPPIJ, also
known as Royal Dutch Petroleum Company;
THE SHELL TRANSPORT AND TRADING COMPANY,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Texas

Before BARKSDALE, BENAVIDES, and STEWART, Circuit Judges.

RHESA HAWKINS BARKSDALE, Circuit Judge:

Primarily at issue are whether, pursuant to the Foreign Sovereign Immunities Act (FSIA), 28 U.S.C. §§ 1330, 1602-11, Al Furat Petroleum Company is an "organ" of Syria for purposes of defeating subject matter jurisdiction; and, if it is, whether immunity is precluded by the FSIA commercial activity exception, 28 U.S.C. § 1605 (a)(2). The district court dismissed Al Furat for lack of subject matter jurisdiction; the other Appellees, for lack of personal jurisdiction. As part of contesting those dismissals, Appellants maintain they were denied adequate discovery. We **AFFIRM**.

I.

On 3 May 1995, a Syrian well, operated by Al Furat Petroleum Company, began leaking oil and gas. That same day, Warmenhoven, who was employed in The Netherlands by SIPM, one of the Royal Dutch/Shell group of companies, called Boots & Coots, L.P. (B&C) in Houston, Texas, to determine its availability to perform well control services.

The call was routed to John Wright, of Wright, Boots & Coots, L.L.C. (WB&C), also in Houston, who confirmed WB&C's availability. Warmenhoven explained that he did *not* have authority to hire WB&C, but told Wright he would suggest that Al Furat contract WB&C. When deposed

concerning jurisdiction for this action; discussed *infra*, Wright described Warmenhoven as a "worldwide drilling troubleshooter" who advised operating units on mobilization of resources.

Wright proposed to Al Furat that He (Wright), as blowout adviser, and three firefighters (Appellants' decedents) travel to Syria to perform well control services. After receiving confirmation from Al Furat on fees for such services, Wright and Appellants' decedents traveled to Syria that same day.

On 5 May, two days after the leak began and Wright was contacted, Al Furat signed a B&C work order, for B&C, as an independent contractor, to assist in bringing the well under control. The work order gives Al Furat complete authority, dominion, and control over the well site; and Al Furat agreed to indemnify B&C for personal injury claims and to pay it in Houston. (The evidence submitted by Appellants shows that B&C invoiced WB&C for decedents' services; and that Al Furat was invoiced by, and paid, WB&C for the work performed by decedents.)

Subsequently, Al Furat contracted with WB&C for it to perform blowout response and well killing services. The contract, signed in Syria on 10 and 11 June, but effective as of 3 May, provided: Syrian law governed; Al Furat had complete custody of the well site; WB&C was an independent contractor; Al Furat was to defend and indemnify WB&C for personal injuries to personnel of Al Furat and other contractors attributable to activities at the site; WB&C was responsible for, and would defend and indemnify Al Furat and other contractors for, personal injuries to WB&C and subcontractor personnel attributable to activities at the site; on written request of Al Furat, WB&C could be asked to place purchase orders on behalf of Al Furat for equipment or materials; and preference

was to be given to Syrian products and subcontractors.

On 10 June, Appellants' decedents died when gas escaping from the well ignited. Two years later, decedents' wrongful death beneficiaries filed two actions in Texas state court (one by Strong's beneficiaries, the other by Kelly and Carpenter's) against Al Furat, Syria Shell Petroleum Development B.V. (Syria Shell), Royal Dutch Petroleum Company (Royal Dutch), the Shell Transport and Trading Company (Shell Transport), and others, claiming their negligence and gross negligence caused the three deaths. Appellees removed both actions to federal court. Approximately two weeks later, Appellees moved in both actions for Al Furat's dismissal for lack of subject matter jurisdiction, claiming FSIA immunity, and for all Appellee's dismissal for lack of personal jurisdiction. They also moved to stay discovery pending disposition of their motions.

The two actions were later consolidated, over Appellants' objections. In December 1997, approximately six months after filing the actions, Appellants moved to conduct jurisdictional discovery on FSIA issues. The following January, they moved to compel discovery on personal jurisdiction, and requested a delay in ruling on dismissal pending discovery. That February, Appellants amended their complaints to claim Al Furat breached its contracts with WB&C and B&C.

The magistrate judge to whom all of the motions were referred recommended dismissal and staying discovery. The district court overruled Appellants' objections; adopted the recommendations; and denied Appellants' motions for reconsideration. (Prior to Appellees' dismissal, the other defendants had been dismissed.)

II.

Appellants challenge Al Furat's dismissal under FSIA for lack of subject matter jurisdiction and that of Syria Shell, Royal Dutch, and Shell Transport for lack of personal jurisdiction. Concomitantly, they claim denial of adequate jurisdictional discovery.

A.

Al Furat's dismissal is reviewed *de novo*. *E.g.*, ***Moran v. Kingdom of Saudi Arabia***, 27 F.3d 169, 171 (5th Cir. 1994); ***Walter Fuller Aircraft Sales, Inc. v. Republic of Philippines***, 965 F.2d 1375, 1383 (5th Cir. 1992) ("We review the district court's conclusions about sovereign immunity *de novo*").

> A court may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on (1) the complaint alone; (2) the complaint supplemented by undisputed facts; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts. Where . . . the district court has relied on the third of these bases and has made jurisdictional findings of fact, those findings are reviewed for clear error.

Robinson v. TCI/US West Cable Communications Inc., 117 F.3d 900, 904 (5th Cir. 1997) (footnotes omitted).

Concerning Al Furat, "[t]he FSIA sets forth 'the sole and exclusive standards to be used' to resolve all sovereign immunity issues". ***Arriba Ltd. v. Petroleos Mexicanos***, 962 f.2d 528, 532 (5th Cir.) (quoting H.R. REP. NO. 1487, 94th

Cong., 2d Sess. 12 (1976), 1976 U.S.C.C.A.N. 6604, 6610), *cert. denied*, 506 U.S. 956 (1992); *see* 28 U.S.C. § 1602 ("Claims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter.").

The FSIA gives federal courts jurisdiction over civil actions against "a foreign state . . . as to any claim for relief in personam with respect to which the foreign state is *not* entitled to immunity under [28 U.S.C. §§] 1605 - 1607 . . . or under any applicable international agreement". 28 U.S.C. § 1330 (a) (emphasis added). "Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have [subject matter] jurisdiction under [§1330] (a) where service has been made under [28 U.S.C. §] 1608". 28 U.S.C. § 1330 (b). Accordingly, "personal jurisdiction, like subject-matter jurisdiction, exists only when one of the exceptions to foreign sovereign immunity in §§ 1605 - 07 applies". ***Argentine Republic v. Amerada Hess Shipping Corp.***, 488 U.S. 428, 434 n.3 (1989). *See also* ***Verlinden B.V. v. Central Bank of Nigeria***, 461 U.S. 480, 485 n.5 (1983) ("Under the [FSIA], ... both statutory subject-matter jurisdiction . . . and personal jurisdiction turn on application of the substantive provisions of the [FSIA].").

"[A] foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in [28 U.S.C. §§] 1605 to 1607". 28 U.S.C. § 1604. A "foreign state" includes "a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in [§ 1603] (b). 28 U.S.C. § 1603 (a). Such foreign state "agency or instrumentality" is:

> any entity -
>
> (1) which is a separate legal person, corporate or

otherwise, and

> (2) which is an organ or a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332 (c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. § 1603 (b).

It is undisputed that Al Furat satisfies § 1603 (b)'s first and third requirements for agency or instrumentality status. The district court held Al Furat satisfied both prongs of the second requirement, as well, holding it is an organ of a foreign state and a foreign state owns a majority of Al Furat's shares or other ownership interest. Appellants challenged the rulings as to both prongs.

Concerning § 1603 (b) (2)'s "ownership" prong, the Syrian government owns Syrian Petroleum Company (*not* a party), which owns 50% of Al Furat. Therefore, at issue for that prong is the requisition majority status. But, because we conclude that Al Furat is an organ of a foreign state, we need *not* consider § 1603 (b) (2)'s ownership requirements.

1.

Appellants claim Al Furat presented insufficient evidence to establish organ status. Alternatively, they maintain the district court erred by ruling without allowing them

discovery. Resolution of the discovery issue is best understood in light of our analysis of the first issue, including the sufficiency of the evidence regarding Al Furat's organ status. *See* ***Wyatt v. Kaplan***, 686 F.2d 276, 278 (5th Cir. 1982).

a.

Most cases have determined § 1603 (b) (2) agency/instrumentality status using the "ownership", rather than the "organ", prong. *See* ***Supra Med. Corp. v. McGonigle***, 955 F. Supp. 374, 378-79 (E.D. Pa. 1997) (observing that only a few federal courts have examined the "organ" prong, with *no* clear test to determine whether an entity so qualifies). In ***Corporacion Mexicana de Servicios Maritimos, A.A. de C.V. v. M/T Respect***, 89 F.3d 650, 655 (9th Cir. 1996), Pemex-Refining was held an organ of a foreign state, because it: was created by Mexican law; is entirely owned by the Mexican government; is controlled entirely by government appointees; employs only public servants; and is charged with the exclusive responsibility of refining and distributing Mexican government property.

Citing ***Corporacion***, the ***Supra*** district court listed five factors for determining § 1603 (b) (2) organ status:

> (1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires the hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some right in the [foreign] country; and (5) how the entity is treated under foreign state law.

955 F. Supp. at 379.

Recently, Nippon Hoso Kyokai (NHK), the public television broadcasting corporation of Japan, was held and organ of Japan. ***Alpha Therapeutic Corp. v. Nippon Hoso Kyokai***, 199 F.3d 1078, 1084 - 85 (9th Cir. 1999). NHK was created by the Japanese broadcast law, which required ti to broadcast for the public welfare; its programming had to satisfy government-mandated goals; its board members were appointed by the Japanese Prime Minister, with the consent of the Japanese parliament; a government minister supervised the board and reviewed the budget which had to be approved by the parliament; its funding is derived from a government-mandated fee collected from all Japanese television owners; any amendment to its articles of incorporation that governed its operation must be adopted and approved by the government minister; it cannot earn profits and carries not commercial advertisements; and it is the only broadcaster designated by the Prime Minister as a "designated public institution". ***Id.*** at 1084. In rejecting plaintiffs' contention that NHK is *not* and organ of Japan because it has autonomy and independence from the Japanese government, the Ninth Circuit noted that "Japan has considerable control over the content of NHK's programming, budget, and operations". ***Id.*** at 1085.

In holding Al Furat is an organ of Syria, the district court applied the ***Supra*** factors, and they are utilized by both sides here. Accordingly, we shall apply them.

This notwithstanding, we agree with the ***Alpha*** and ***Supra*** courts that there is no "clear test" for determining agency or instrumentality status under the § 1603 (b) (2) "organ" prong. *See* ***Alpha***, 199 F.3d at 1084; ***Supra***, 955 F. Supp. at 378-79. Therefore, although the ***Supra*** factors

provided a helpful framework, we will *not* apply them mechanically or require that all five support an organ-determination.

Our analysis must also take into account the nature of FSIA immunity, which is immunity not only from liability, but from the burdens of litigation as well. *See, e.g.*, ***United Staes v. Moats***, 961 F.2d 1198, 1203 (5th Cir. 1992) ("sovereign immunity is an immunity from burdens of becoming involved in any part of the litigation process, from pretrial wrangling to trial itself"). And, our analysis must also be guided by the well-established principle that, although a party claiming FSIA immunity retains the ultimate burden of persuasion on immunity, it need only present a prima facie case that it is a foreign state; and, if it does, the burden shifts to the party opposing immunity to present evidence that one of the exceptions to immunity applies. *E.g.*, ***Byrd v. Corporacion Forestal y Industrial de Olancho S.A.***, 182 F.3d 380, 388 (5th Cir. 1999); ***Waller v. Fuller Aircraft Sales***, 965 F.2d at 1383; ***Arriba***, 962 f.2d at 533.

To support dismissal, Al Furat submitted declarations of its operations manager, Olsen, and the chief executive officer of Syrian Petroleum Company, Dr. Mualla. The latter declaration states: Syrian Petroleum Company was established according to Syrian law; its principal place of business is in Syria; and it is owned entirely by the Syrian government.

Olsen's declaration states: he is familiar with Al Furat's corporate records and activities; it is a citizen of Syria and has its principal place of business there; it is a private, non-profit-making, non-asset owning agent company incorporated under Syrian law; it is owned 50% by Syrian Petroleum Company, 31.25% by Syria Shell, and 18.75% by Deminex Syria GmbH; it was formed pursuant to a government authorization decree

stating that Al Furat's objective is to develop identified petroleum reserves in Development Lease Areas in Syria; its by-laws require that, for its eight-member board, four be appointed by Syrian Petroleum Company, with one always serving as chairman; and, in view of Syria's declared policy, supported by Syrian law, that all minerals under the surface remain the property of Syria and will be explored and developed in a way to best serve the interests of Syria, Syrian Petroleum Company's representatives on the board have invariably been Syrian government officials representing the highest level of government.

Relying on those declarations, the district court concluded Al Furat had made a prima facie showing of immunity under the § 1603 (b) (2) organ prong. It reasoned: Al Furat was created for a national purpose, because it was formed by government decree to develop and explore Syria's mineral resources, control over which is a basis aspect of sovereignty; and it had the exclusive right to develop those resources. The court noted also that, in ***Ebrahim v. Shell Oil Co.***, 847 F. supp. 65, 67 (S.D. TEX. 1994), Al Furat had been determined to be a Syrian agency or instrumentality. *See* ***Atwood Turnkey Drilling, Inc. v. Petroleo Brasileiro, S.A.***, 875 F.2d 1174, 1176 (5th Cir. 1989) (citing district court cases recognizing Petrobas' foreign sovereign status to support conclusion it was foreign sovereign), *cert. denied*, 493 U.S. 1075 (1990).

Asserting that the evidence presented by Al Furat pertains to only the first (foreign state-created entity for national purpose) and fourth (entity holds exclusive rights to some right in foreign country) ***Supra*** factors, Appellants contend the district court erred by concluding Al Furat is an organ of Syria in the absence of any evidence as to the remaining factors (whether Syria requires Al Furat to hire

public employees and pays their salaries; whether Syria actively supervises it; and its treatment under Syrian law). And, they contend the evidence pertaining to the fourth ***Supra*** factor does *not* support the district court's conclusion that Al Furat has the exclusive right to develop Syria's mineral resources. They contend further that the district court erred in relying solely on Olsen's declaration regarding the provisions of Syrian law and Al Furat's by-laws, claiming his declaration raises more questions than it answers with respect to: governmental supervision and control over Al Furat; whether Olsen has expertise qualifying him to testify regarding Syrian law and policy; and the identity of Syrian government officials who have served on Al Furat's board. In sum, Appellants maintain that the conclusion is *not* supported by sufficient evidence, because Al Furat addressed only two of the five ***Supra*** factors, and the documents referenced in Olsen's declaration were *not* provided to the court.

The evidence is sufficient to support the district court's conclusion that Al Furat made a prima facie showing it is an organ of Syria. With respect to the first ***Supra*** factor, Olsen's declaration establishes that Al Furat was created by a Syrian government decree for a national purpose: the development and exploration of Syria's mineral resources, pursuant to Syria's policy that all minerals under the surface remain the property of Syria and will be explored and developed in a manner that will best serve the interests of Syria. Contrary to Appellants' assertion, the evidence that Syrian Petroleum Company appoints four of the eight Al Furat board members, including the chairman, and that such appointees have invariably been high-level Syrian government officials, supports a determination of organ status under the second and third ***Supra*** factors. And, also contrary to Appellants' contention, the

evidence supports the district court's conclusion, with respect to the fourth ***Supra*** factor, that Al Furat has the exclusive right to explore and develop Syria's identified petroleum reserves, which are the property of the Syrian government.

And, in addition to the Olsen and Dr. Mualla declarations establishing that Al Furat was created for the purpose of developing identified petroleum reserves in Development Lease Areas in Syria, Al Furat also supported its dismissal motion with a copy of the legislative decree creating Syrian Petroleum Company (again, wholly owned by the Syrian government, owns 50% of Al Furat, and appoints half of its board, including the chairman). The decree provides that Syrian Petroleum Company "shall handle all the works that aim[] to discover [] oil wealth [] in the country and to exploit and develop such wealth".

There is *no* evidence as to how Al Furat is treated under Syrian law (the fifth ***Supra*** factor). But, this does *not* undermine our conclusion that, on balance, Al Furat presented sufficient evidence to establish a prima facie case for organ status.

b.

Alternatively, in maintaining they were *not* allowed necessary discovery regarding the extent of Syria's control over Al Furat, Appellants claim the district court abused its discretion by *not* allowing them to depose Olsen and review the documents and laws referenced in his declaration.

Again, FSIA immunity is immunity not only from liability, but also from the costs, in time and expense, and other disruptions attendant to litigation. *See* ***Moats***, 961 F.2d at 1203 ("sovereign immunity is an immunity from the burdens of

becoming involved in any part of the litigation process, from pretrial wrangling to trial itself"); ***In re Papandreou***, 139 F.3d 247, 251 (D.C. Cir. 1998) ("[s]overeign immunity is an immunity from trial and the attendant burdens of litigation, and not just a defense to liability on the merits" (internal quotation marks and citation omitted)).

Accordingly, when FSIA immunity has been claimed, unlimited jurisdictional discovery is *not* permitted as a matter of course. Instead, it "should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination". ***Arriba***, 962 F.2d at 534; *see also* ***First City, Texas-Houston, N.A. v. Rafidain Bank***, 150 F.3d 172, 176 (2d Cir. 1998) (comity concerns implicated by allowing jurisdictional discovery from foreign sovereign "require a delicate balancing between permitting discovery to substantiate exceptions to statutory foreign sovereign immunity and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery"); ***Papandreou***, 139 F.3d at 253 ("discovery [authorized] to determine whether immunity bars jurisdiction must proceed with circumspection, lest the evaluation of the immunity itself encroach unduly on the benefits the immunity was to ensure").

The district court "is given the authority to resolve factual disputes, along with the discretion to devise a method for making a determination with regard to the jurisdictional issue". ***Moran***, 27 F.3d at 172. The procedure it adopts "may include considering affidavits, allowing . . . discovery, hearing oral testimony, conducting an evidentiary hearing". ***Id.*** As stated, "discovery . . . should be limited to only that which is necessary to determine the preliminary jurisdictional issue". ***Id.*** "A necessary prerequisite to an order for limited discovery is a district court's clear understanding of the plaintiff's claims

against a sovereign entity." ***Arriba***, 962 F.2d at 534.

In denying discovery, the district court relied on our court's opinion in ***Arriba***. Appellants assert that ***Arriba***, which addressed discovery regarding whether an exception to immunity applied, is inapplicable, because they instead sought discovery to ascertain whether Al Furat *was* a sovereign. They contend it was circuitous for the district court to deny is-al Furat-a-sovereign-discovery on the ground that its status as a sovereign protected it from such discovery. Appellants maintain that deposing Olsen regarding Syria's supervision and control of Al Furat, and reviewing the documents referenced in his declaration, were crucial for determining whether Al Furat is an organ of Syria.

Our review of the record reveals *no* abuse of discretion in denying the discovery. As discussed *infra*, although Appellants were *not* prohibited from seeking discovery for over three months, they did *not* make any formal requests to conduct it on the immunity issue until after being informed by the magistrate judge that a recommendation on dismissal was imminent.

Both actions (Kelly/Carpenter and Strong) were removed on 10 July 1997. Al Furat's dismissal motions were filed approximately two weeks later, on 25 July.

On 8 August, Appellant Strong moved to conduct discovery prior to the FED. R. CIV. P. 26 (f) conference, maintaining she could *not* adequately respond to Al Furat's motion until after deposing Olsen and Dr. Mualla. *See* FED .R. CIV. P. 26 (d) ("Except when authorized under these rules or by local rule, order, or agreement of the parties, a party may *not* seek discovery from any source before the parties have met and conferred as required by subdivision (f)." (emphasis added)). And, in their 14 August opposition to Al Furat's motions,

Appellants requested that ruling on dismissal be deferred pending completion of discovery regarding the factual allegations in the declarations supporting dismissal, including deposing Olsen and Dr. Mualla.

In its 4 September reply to the Kelly and Carpenter Appellants' opposition to dismissal, Al Furat asserted that, because sovereign immunity is immunity from attendant burdens of suit as well as from liability, and because Appellants had made *no* showing of what they hoped to obtain by discovery, the court should *not* permit a "fishing expedition". And, on 8 September, Al Furat moved in the Strong action to stay discovery pending ruling on dismissal.

The two actions were consolidated on 8 October. Al Furat, on 17 October, filed a supplemental motion to stay discovery and to defer Rule 26 matters, pending ruling on dismissal.

None of the motions were ruled on prior to the 7 November Rule 26 (f) conference. On 11 November, the parties submitted their Rule 26 (f) joint discovery/case management plan, with Appellants stating they were ready to begin discovery immediately, and Al Furat opposing discovery pending ruling on dismissal.

At oral argument here, Appellants conceded they had *not* been prohibited from conducting discovery between 7 November 1997 Rule 26 (f) conference and 24 February 1998, when the magistrate judge made her discovery recommendation. Although by motion and supplemental response to Al Furat's dismissal motion, both filed in early December, Appellants stated their desire to conduct discovery, they did *not* formally request it until 19 January 1998 (over two months after the Rule 26 (f) conference), when they noticed the deposition of Wright of WB&C.

Appellees moved for a protective order to preclude Wright's deposition, asserting discovery should be stayed pending ruling on dismissal. The magistrate judge, at a telephonic hearing on 22 January, allowed Wright's deposition on personal jurisdiction only, because Appellants had *not* shown immunity discovery should be allowed. During the conference, the magistrate judge advised she was ready to make a recommendation on dismissal.

At Wright's deposition the next day, 23 January, Appellants stated on the record they wanted to depose Warmenhoven, Olsen, and Anderson (the latter was believed to be associated with Al Furat) on jurisdictional matters; Al Furat would *not* agree. On 27 January, despite there being *no* outstanding discovery requests, Appellants moved to compel discovery and to delay ruling on dismissal. The documetns at issue in the motion to compel had been requested at Wright's 23 January deposition, but he had refused to produce them because of a confidentiality agreement with Al Furat. Appellants eventually received them.

Al Furat's immediate response was that, in the light of the magistrate judge's statement that a recommendation on dismissal was imminent, it was hardly surprising it refused the verbal request to produce for depositions three persons who lived overseas. Al Furat asserted further that the court should require Appellants to give a better reason to depose overseas witnesses than disbelief in their sworn declarations. (Anderson did *not* file a declaration).

At a 29 January hearing on the motion to compel, the magistrate judge expressed frustration at Appellants' failure, despite repeated requests, to demonstrate a need for discovery by articulating specific facts crucial to the immunity issue. The magistrate judge stated further that Appellants had *not* taken

any steps to conduct discovery other than depositing Wright, which she had allowed, albeit only as to personal jurisdiction. The magistrate judge, "in utmost generosity and abundance of caution", stated she would allow Appellants, on or before 9 February, to file supplemental responses to Al Furat's motion to stay discovery, giving them yet another opportunity to make the requisite showing to obtain discovery from Al Furat on immunity.

In their 9 February memorandum in support of allowing discovery and delaying ruling on dismissal, Appellants asserted: they were entitled to all documentation regarding Al Furat's creation; they should be allowed discovery on other indicia of ownership interest by Al Furat's owners, and on issues of actual control, financial arrangements between the parties, and distribution of profits and proceeds, including production of crude oil and gas; because their claims are based on duties created by Al Furat's contracts with WB&C and B&C, they were entitled to discovery regarding those contracts, the rights and responsibilities of the parties under them, and the effect of the contracts on Al Furat's activities in the United States; and they should be allowed to depose Olsen to determine the background and sources of the information of his declaration. They asserted also: the court should *not* be entirely dependent on Olsen's interpretation of Syrian law, because there was *no* showing he was qualified to make the legal conclusions in his declaration or had any authority to speak for the Syrian government; they expected discovery to show Al Furat has many current or former Shell employees or contractors playing significant roles; and there were questions concerning whether "Shell" controlled Al Furat.

According to Appellees (and *not* disputed by Appellants), Appellants propounded their *first* written

discovery on 17 February 1998. One week later, on 24 February, the magistrate judge recommended staying discovery. Two days later, the magistrate judge recommended dismissal. Both recommendations were adopted on 31 March.

Appellants attempt to excuse their lack of discovery diligence on the ground that, because Al Furat had steadfastly expressed its opposition, it was readily apparent that specific discovery requests would only lead to additional opposition and, because such motions were already pending, it would have been an unnecessary waste of effort to serve specific discovery requests or notice depositions. Such alleged futility does *not* excuse *not* making specific discovery requests, and obtaining a ruling in the event of objection by Al Furat. Although free to do so after 7 November, Appellants did *not* make any specific, formal discovery requests on immunity until *after* the magistrate judge had advised a recommendation regarding dismissal was imminent.

Moreover, despite repeated attempts by the magistrate judge to obtain from Appellants the requisite showing of a need for immunity discovery from Al Furat, Appellants essentially claimed *only* entitlement to cross-examine Olsen and to examine the documents and laws referenced in his declaration to determine whether he had told th truth. In her recommendation on the discovery issues, the magistrate judge noted Appellants had been given several opportunities to make the requisite showing for justifying immunity discovery, but had *not* alleged specific facts which, if true, would show Al Furat was *not* entitled to immunity, or that any exception to immunity applied. The magistrate judge stated further that Appellants had offered *no* reason to question that Olsen was credible or that, as Al Furat's operations manger, he was qualified to testify about Al Furat's structure; and that they had

not provided legal support for blanket disregard of his sworn statements in the absence of such question.

Considering Appellants' failure to diligently seek discovery and their concomitant failure to alleged specific facts crucial to immunity which demonstrated a need for discovery, the district court did *not* abuse its discretion by *not* allowing Appellants to conduct such discovery prior to ruling on dismissal.

2.

Notwithstanding Al Furat being an organ of Syria, Appellants contend the district court erred by refusing to apply the 28 U.S.C. § 1605 (a) (2) commercial activity exception to immunity. A foreign state is *not* immune from suit in United States courts when

> the action is *based upon* a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. § 1605 (a) (2) (emphasis added). "Commercial activity" is

> either a regular course of commercial conduct or a particular commercial transaction act. The

> commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603 (d).

Appellants rely on the first clause of § 1605 (a) (2): "commercial activity carried on in the United States by the foreign state", defined by the FSIA as "commercial activity carried on by such state and having substantial contact with the United States". 28 U.S.C. § 1603 (e). They claim Al Furat carried on commercial activity in the United States by entering into contracts with WB&C and B&C, which required performance in both Syria and the United States. Appellants maintain: the B&C work order required Al Furat to pay B&C invoices in Texas (although, as noted, there is *no* evidence it did so); in the WB&C contract, Al Furat appointed WB&C as its agent for procuring equipment, materials, and services in the United States; and, as a result of that agency relationship, Al Furat, through its agent WB&C, purchased goods and services from various contractors in the United States, including B&C, which employed Appellants' decedents. Appellants assert their claims are based on Al Furat's breach of its contractually imposed duties to monitor the work and set safety standards; therefore, the claims are based upon Al Furat's commercial activity in the United States.

The district court rejected the commercial activity exception because the contracts were executed in Syria; decedents were *not* third party beneficiaries to the contracts; and Appellants' claims are *not* based upon those contracts. As discussed *infra*, the commercial activity exception does *not*

apply, because Appellants' claims are *not* based upon Al Furat's assumed commercial activity in the United States. (Therefore, we do *not* address Appellants' contentions regarding the first two bases for the ruling on the exception.)

We assume *arguendo* that Al Furat engaged in commercial activity in the United States when it entered into contracts with WB&C and B&C for well control services. *See* ***Republic of Argentina v. Weltover, Inc.***, 504 U.S. 607, 614 (1992) ("when a foreign government acts, not as regulator of a market, but in the manner of a private player within it, the foreign sovereign's actions are 'commercial' within the meaning of the FSIA"); ***Walter Fuller Aircraft Sales***, 965 F.2d at 1384 ("courts typically hold that contracts for the procurement of goods and services are commercial rather than governmental in nature").

Nevertheless, as stated in § 1605 (a) (2), the commercial activity exception applies *only* if Appellants' claims are "based upon" that activity. *See, e.g.*, ***Voest-Alpine Trading USA Corp. v. Bank of China***, 142 F.3d 887, 892 (5th Cir.). ("the cause of action [must] be 'based upon' a certain act or activity of the foreign state, that is, the act or activity must form the basis of at least some element of the cause of action"), *cert. denied*, 525 U.S. 1041 (1998); ***Walter Fuller Aircraft Sales***, 965 F.2d at 1384 ("suit must be based upon 'commercial activity' which has at least one of the three jurisdictional connections with the United States set forth in § 1605 (a) (2)"); ***Arriba***, 962 F.2d at 533 ("the commercial activity that provides the jurisdictional nexus with the United States must also be the activity on which the lawsuit is based" (internal quotation marks and citation omitted)); ***Moats***, 961 F.2d at 1205 ("the applicability on the commercial activities exception depends on whether the particular conduct giving rise to the claim in

question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character").

In ***Saudi Arabia v. Nelson***, 507 U.S. 349, 357 (1993), the Court stated that the § 1605 (a) (2) "based upon" phrase "is read most naturally to mean those elements of a claim that, if proven, would entitle a plaintiff to relief under his theory of the case". In ***Nelson***, plaintiff alleged he was recruited in the United States by Saudi Arabia for employment there and, while in Saudi Arabia, was imprisoned and tortured by the Saudi government. ***Id.*** at 352-54. The Supreme Court rejected plaintiffs' contention that the first clause of the commercial activity exception applied, explaining that, although Saudi Arabia's commercial activity in the United States (recruiting plaintiff for employment in Saudi Arabia) "led to the conduct that eventually injured" plaintiff, that commercial activity was "*not* the basis for" plaintiff's action, which claimed he suffered "personal injuries caused by [Saudi Arabia's] intentional wrongs and by [its] failure to warn". ***Id.*** at 358 (emphasis added). "Those torts, and *not* the arguably commercial activities that preceded their commission, form[ed] the basis for [plaintiff's] suit." ***Id.*** (emphasis added).

As noted, Appellants did amend their complaints to claim breach of contract. But, because they do *not* challenge the ruling they are *not* third-party beneficiaries of the WB&C contract or the B&C work order, they have apparently abandoned their claim they have standing to sue for breach of contract. Instead, their focus on appeal seems to be that the WB&C contract establishes the requisite duty element for their negligence claims.

They maintain proof of the duty element is established by Al Furat's contract with WB&C, which imposed on Al

Furat duties to monitor the work and set safety standards applicable to contractors at the well site. Appellants thus contend the Al Furat/WB&C contract is an essential element of their negligence claims against Al Furat, and assert their claims are based on that contract, on the ground that Al Furat's claimed breach of those contractually-imposed duties proximately caused the deaths.

Obviously, one of the essential elements of the negligence claims is the existence of a duty imposed on Al Furat. But, simply because the WB&C contract imposes duties on Al Furat, the breach of which allegedly caused the deaths, does *not* make that contract an essential element of the claims. Because Appellants are neither parties to, nor third-party beneficiaries of, that contract, any duty owned by Al Furat to decedents arose by operation of law, independent of the existence of that contract. As in ***Nelson***, the alleged "torts, and *not* the arguably commercial activities that preceded their commission, form the basis for [Appellants'] suit". 507 U.S. at 358 (emphasis added).

Accordingly, the district court correctly concluded that the commercial activity exception does *not* apply.

B.

We review *de novo* the lack of personal jurisdiction dismissal of Syria Shell, Royal Dutch, and Shell Transport (collectively, Shell Appellees). ***Alpine View Co. Ltd. v. Atlas Copco AB***, 205 F.3d 208, 214 (5th Cir. 2000). Although Appellants bear the burden of proof, it is *not* necessary for them to "establish personal jurisdiction by a preponderance of the evidence; *prima facie* evidence of personal jurisdiction is

sufficient". ***Wyatt***, 686 F.2d at 280. We accept their "uncontroverted allegations, and resolve in [their] favor all conflicts between the facts contained in the parties' affidavits and other documentation". ***Alpine***, 205 F.3d at 215.

The Texas long-arm statute, TEX. CIV. PRAC. & REM. CODE ANN. 17.042, authorizes personal jurisdiction over a nonresident defendant to the fullest extent allowed by the United States Constitution. *See* ***Wilson v. Belin***, 20 F.3d 644, 647 n.1 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994). Accordingly, we need only determine whether exercising jurisdiction over Shell Appellees is consistent with the Due Process Clause. *See* ***Alpine***, 205 F.3d at 214.

Due process standard for personal jurisdiction are well-established.

> The Due Process Clause . . . permits the exercise of personal jurisdiction over a nonresident defendant when (1) that defendant has purposefully availed [itself] of the benefits and protections of the forum state by establishing *minimum* contacts with the forum state; and (2) the exercise of jurisdiction over that defendant does not offend traditional notions of fair play and substantial justice.

Id. at 214 - 15. (internal quotation marks and citation omitted; emphasis added). *

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* For the first prong of this two-part test, as discussed *infra*, Appellants have *not* made a prima facie showing that Shell Appellees have the requisite minimum contracts with Texas. Therefore, we need *not* consider the second prong - whether exercising personal jurisdiction would

The "minimum contacts" requirement can be established through contacts sufficient to assert either specific or general jurisdiction. ***Id.*** at 215.

> *Specific jurisdiction* over a nonresident corporation is appropriate when that corporation has purposefully directed its activities at the forum state and the litigation results from alleged injuries that *arise out of or relate to those activities. General jurisdiction*, on the other hand, will attache where the nonresident defendant's contacts with the forum state, although *not* related to the plaintiffs' cause of action, are *continuous* and *systematic*.

Id.. (emphasis added) (internal quotation marks and citation omitted). Appellants claim Syria Shell's contacts with Texas support specific jurisdiction, while the contacts by it and the other two Shell Appellees support general jurisdiction.

1.

We first address specific jurisdiction *vel non* for Syria Shell, which owns almost a third of Al Furat.

a.

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offend "traditional notions of fair play and substantial justice".

Appellants implicitly concede Syria Shell had *no* direct contacts with Texas. Nevertheless, they base specific jurisdiction on their claims allegedly arising out of the contract between Al Furat and WB&C, which provided that, in entering into that contract, Al Furat was acting as an agent for Syria Shell, and which appointed WB&C as agent for Al Furat and Syria Shell for obtaining goods and services from Texas for use in controlling the well. Appellants assert that, by entering into a contract with a Texas company for services to be performed in Texas, Syria Shell, through its claimed agent, Al Furat, established the requisite minimum contacts with Texas. (Appellants also rely on evidence that Warmenhoven, and employee of a "Shell" entity, initially contacted WB&C to secure the services of Appellants' decedents in Syria; and that Beasely, a "Shell" employee, negotiated the contract between Al Furat and WB&C. But, they do *not* explain how such evidence supports specific jurisdiction for Syria Shell.)

The language relied on in Al Furat's contract with WB&C does *not* provide that Al Furat is acting as agent for Syria Shell in executing that contract. Instead, it states that Al Furat was "an agent for [Syria Shell] in executing the service contract for the exploration of oil ratified by law number 43 1977". Obviously, this recitation does *not* make Al Furat an agent for Syria Shell for purposes of the WB&C contract.

But, even assuming Al Furat's contacts with Texas, in entering into and performing the contract with WB&C, are properly attributable to Syria Shell, specific jurisdiction does *not* exist for it, because Appellants' claims do *not* arise out of those contracts. Instead, they arise out of alleged tortious acts committed by Al Furat in Syria.

Accordingly, the district court correctly concluded there was *no* specific jurisdiction for Syria Shell.

b.

Alternatively, Appellants contend they should have been allowed more jurisdictional discovery prior to Syria Shell's dismissal. A district court has "broad discretion in all discovery matters", and "such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse." ***Wyatt***, 686 F.2d at 283 (internal quotation marks and citation omitted).

A district court is *not* required to defer ruling on a jurisdictional motion until all discovery contemplated by the plaintiff has been accomplished; instead, an *opportunity* for discovery is required. *See* ***Patterson v. Diertz, Inc.***, 764 F.2d 1145, 1147 n.4 (5th Cir. 1985). Our discussion of Appellants' lack of diligence regarding FSIA immunity discovery is relevant to our analysis of discovery issues relating to personal jurisdiction, because the discovery motions and responses generally dealt with both types of jurisdiction.

As discussed, Appellants did *not* take advantage of the ample opportunity to conduct discovery. Despite there being *no* formal prohibition on discovery after the 7 November 1997 Rule 26 (f) conference, Appellants made *no* specific discovery requests until they noticed Wright's deposition on 19 January. The magistrate judge allowed them to depose Wright regarding personal jurisdiction, and they obtained the requested documents regarding the communications between Al Furat and WB&C about their contract. After being informed by the magistrate judge that a recommendation on dismissal was imminent, Appellants did *not* notice any other depositions, and sent their first written discovery request only one week before the magistrate judge made her recommendation on discovery, and only nine days before she made her recommendation on

dismissal.

Moreover, "[d]iscovery on matters of personal jurisdiction . . . need not be permitted unless the motion to dismiss raises issues of fact". ***Wyatt***, 686 F.2d at 284. "When the lack of personal jurisdiction is clear, discovery would serve no purpose and should not be permitted." ***Id.*** Appellants' brief does *not* describe the discovery they contend should have been allowed, what facts they hoped to obtain from such discovery, or how it would produce information that would support specific jurisdiction for Syria Shell. In any event, *no* amount of information Syria Shell's contacts with Texas, through its claimed agent, Al Furat, would strengthen Appellants' assertion of specific jurisdiction for Syria Shell, because, as stated, their claims did *not* arise from such contacts.

Accordingly, the district court did *not* abuse its discretion by *not* allowing additional jurisdictional discovery prior to ruling there was *no* specific jurisdiction for Syria Shell. *See* ***id.*** ("this Court affirms denials of discovery on questions of personal jurisdiction in cases where discovery sought could not have added any significant facts" (internal quotation marks and citation omitted)).

2.

Appellants claim general jurisdiction for Syria Shell and the other two Shell Appellees (Royal Dutch and Shell Transport).

a.

Appellants maintain the ongoing relationship between WB&C and Syria Shell, through its claimed agent, Al Furat, is

sufficient to constitute continuous and systematic contacts for general jurisdiction for Syria Shell. They assert that, if the district court had allowed discovery on the nature and extent of that relationship, they could have developed evidence of such contacts' systematic and continuous nature.

Even assuming Al Furat's contacts with Texas, through its contractual relationships with WB&C and B&C, are attributable to Syria Shell, they were *not* continuous and systematic and thus do *not* confer general jurisdiction for Syria Shell. ***See Helicopteros Nacionales de Colombia, S.A. v. Hall***, 466 U.S. 408, 415 - 19 (1984).

With respect to their inadequate-discovery contention, Appellants have *not* described the discovery they contend should have been allowed, or how it could produce evidence establishing the propriety of general jurisdiction for Syria Shell. Moreover, as discussed, Appellants did *not* exercise diligence in discovery.

b.

The other two Shell Appellees, Royal Dutch and Shell Transport, had *no* direct contacts with Texas. General jurisdiction is claimed because of their ownership of Shell Petroleum Inc., which owns Shell Oil Company, which has its principal place of business in Texas. Appellants do so by attributing Shell Oil Company's contacts with Texas to Royal Dutch and Shell Transport. Concomitantly, they claim the district court erred by dismissing Royal Dutch and Shell Transport without allowing depositions of those Appellees regarding their relationship with, and control over, Shell Oil Company, as well as to determine whether they maintained other contacts with Texas.

To attribute Shell Oil Company's contacts with Texas to Royal Dutch and Shell Transport, which own Shell Petroleum Inc., Appellants would have to establish: (1) Royal Dutch and Shell Transport are the alter egos of Shell Petroleum, which owns Shell Oil Company; and (2) Shell Petroleum is the alter ego of Shell Oil Company. There is *no* evidence to support either conclusion.

The prerequisites for establishing personal jurisdiction over a corporation, based on the contacts of its subsidiary, are described in ***Hargrave v. Fibreboard Corp.***, 710 F.2d 1154 (5th Cir. 1983).

> [S]o long as a parent and subsidiary maintain separate and distinct corporate entities, the presence of one in a forum state may not be attributed to the other . . . Generally, our cases demand proof of control by the parent over the internal business operations and affairs of the subsidiary in order to fuse the two for jurisdictional purposes . . . The degree of control exercised by the parent must be greater than that normally associated with common ownership and directorship . . . All the relevant facts and circumstances surrounding the operations of the parent and subsidiary must be examined to determine whether two separate and distinct corporate entities exist.

Id. at 1160. (internal quotation marks and citations omitted).

See also ***Access Telecom, Inc. v. MCI Telecommunications Corp.***, 197 F.3d 694, 717 (5th Cir. 1999) ("typically, the corporate independence of companies defeats the assertion of jurisdiction over one by using contacts with the other"); ***Dickson Marine, Inc. v. Panalpina, Inc.***, 179 F.3d 331, 338 (5th Cir. 1999) ("Courts have long presumed the institutional dependence of related corporations, such as parent and subsidiary, when determining if one corporation's contacts with a forum can be the basis of a related corporation's contacts" presumption may be overcome by "clear evidence"); ***Southmark Corp. v. Life Investors, Inc.***, 851 F.2d 763, 773 - 74 (5th Cir. 1988) ("it is well settled that where . . . a wholly owned subsidiary is operated as a distinct corporation, its contacts with the forum cannot be imputed to the parent").

In support of dismissal, Shell Appellees submitted the declarations of van der Vlist, the General Attorney of Royal Dutch; Munsiff, the Secretary of Shell Transport; and Paul, the Assistant Secretary of Shell Oil Company. Those declarations establish: Royal Dutch and Shell Transport are holding companies, which own investments in various entities known collectively as the Royal Dutch/Shell group of companies; Shell Oil Company is a wholly-owned subsidiary of Shell Petroleum Inc.; Royal Dutch and Shell Transport have indirect investments in Shell Oil Company, by virtue of their ownership of Shell Petroleum Inc.; Shell Oil Company is *not* a division of Royal Dutch or Shell Transport; Shell Oil Company has its own capital and its own employee benefit programs; Shell Oil Company's board consists of 11 members, one being an officer of Royal Dutch and one a director of Shell Transport; and Shell Oil Company's officers are *not* officers of Royal Dutch or Shell Transport.

Appellants have *not* made a prima facie showing that

Shell Transport and Royal Dutch so control the activities of Shell Petroleum Inc., and that, in turn, it so controls the activities of Shell Oil Company, that the latter's contacts with Texas may be attributed to Shell Transport and Royal Dutch for purposes of general jurisdiction. Appellants presented *no* evidence that: Royal Dutch and Shell Transport financed the operations of Shell Oil Company; Royal Dutch and Shell Transport caused the incorporation of Shell Oil Company; Shell Oil Company is grossly undercapitalized; Royal Dutch and Shell Transport paid the salaries and other expenses of Shell Oil Company; Shell Oil Company received all its business form Royal Dutch and Shell Transport; Royal Dutch and Shell Transport used Shell Oil Company's property as their own; daily operations of the corporations were *not* separate; or Shell Oil Company does *not* observe corporate formalities. *See* ***Gundle Lining Const. Corp. v. Adam County Asphalt, Inc.***, 85 F.3d 201, 208 - 09 (5th Cir. 1996) (listing factors considered in determining whether subsidiary is alter ego of parent corporation); *see also* ***Gardemal v. Westin Hotel Co.***, 186 F.3d 588, 593 (5th Cir. 1999) (under Texas law, alter ego doctrine "applies when there is such unity between the parent corporation and its subsidiary that the separateness of the two corporations has ceased and holding only the subsidiary corporation liable would result in injustice" (internal quotation marks and citations omitted)).

Accordingly, the district court correctly held that there was *no* general jurisdiction for Royal Dutch and Shell Transport based on Shell Oil Company's contacts with Texas.

(2)

Appellants offer nothing to support their conclusory

assertion they could have established evidence to support their alter ego theory had discovery *not* been restricted. The declarations of the Royal Dutch, Shell Transport, and Shell Oil Company's corporate representatives negate the possibility that, by virtue of their ownership of Shell Petroleum Inc., Royal Dutch and Shell Transport are the alter egos of Shell Oil Company. Appellants offer *no* basis whatsoever to support an inference that those corporate representatives' deposition testimony would contradict their sworn declarations. And, once again, Appellants did *not* act diligently in discovery.

Accordingly, the district court did *not* abuse its discretion by dismissing Royal Dutch and Shell Transport without allowing additional jurisdiction discovery.

III.

For the foregoing reasons, the judgment is

AFFIRMED.

APPENDIX B

Memorandum and Recommendation on Defendants' Motion to Dismiss Dated February 26, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANNIE KELLY, *et al.*	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	H-97-2320
	§	consolidated with
	§	Civil Action No. H-97-2322
	§	
SYRIA SHELL PETROLEUM DEVELOPMENT, B.V., *et al.*	§	
	§	
	§	
Defendants.	§	

MEMORANDUM AND RECOMMENDATION ON DEFENDANTS' MOTION TO DISMISS

This matter was referred by United States District Judge Vanessa D. Gilmore, under 28 U.S.C. §636(b)(1)(A) and (B). (Docket Entry #17, No. 97-2320). Before the court is a motion to dismiss that was filed, jointly, by Defendants Al Furat Petroleum Company ("Al Furat"), Shell Transport and Trading, P.L.C. ("Shell Transport"), Syria Shell Petroleum Development B.V. ("Syria Shell"), and M.V. Koninklije Nederlandsche Petroleum Matsenappij a/k/a Royal Dutch Petroleum Company ("Royal Dutch"), for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack

of personal jurisdiction, under Rule 12(b)(2), for "insufficiency of process and insufficiency of serviced of process", under Rules 12(b)(4) and 12(b)(5), and for *forum non conveniens*. (Docket Entry #4). The parties have filed numerous responses and replies to the motion. (Docket Entries #5, #19, #28, #29, #30, #35, #37, #46, #58, #59, #70, #85, #90, #94, #95 in C.A. No. 97-2320; Docket Entries #14, #22, #23 in C.A. No. 97-2322).

After considering all of the pleadings to date, and the applicable law, it is recommended that Al Furat's motion to dismiss for lack of subject matter jurisdiction, and the motion to dismiss for lack of personal jurisdiction by Syria Shell, Shell Transport, and Royal Dutch, should be granted. (Docket Entry #4). Because the court concludes that Al Furat is entitled to immunity, under the FSIA, its motion to dismiss for "insufficiency of process and insufficiency of service of process" is moot. (Docket Entry #4). Syria Shell, Shell Transport, and Royal Dutch concede that they have been properly served and, therefore, the motion to dismiss Plaintiffs' claims against them, under Rule 12(b)(4) and 12(b)(5), "need no longer be ruled upon." (Joint Advisory to the Court, p.3, Docket Entry #58). Further, because this court concludes that it has neither subject matter jurisdiction over Al Furat, nor personal jurisdiction over Syria Shell, Shell Transport, or Royal Dutch, as discussed more fully below, it need not reach the motion to dismiss for *forum non conveniens*. (Docket Entry #4).

1. Background

This case stems from a fire that occurred on June 10, 1995, at an oil and gas well located in the Syrian Arab

Republic.[1] It is alleged that this fire caused the deaths of Mratin J. Kelly ("Kelly"), Joseph A. Carpenter ("Carpenter"), and Danny Strong ("Strong"). (Plaintiffs' Third Amended Complaint ["Strong's Third Amended Complaint"], Docket Entry #89; and Plaintiffs Annie Kelly and Jeanette Carpenter's Second Amended Complaint ["Kelly and Carpenter's Second Amended Complaint"], Docket Entry #92). Plaintiffs contend that Al Furat, Syria Shell, Shell Transport, and Royal Dutch owned, operated, managed, or controlled the well site at issue (Strong's Third Amended Complaint, p.7; Kelly and Carpenter's Second Amended Complaint, p.7). Plaintiffs claim that Al Furat, on behalf of Syria Shell, Shell Transport, and Royal Dutch, entered into contracts with two Texas companies, Boots & Coots, L.P. and Wright, Boots & Coots, L.L.C., to assist in efforts to bring the well "under control." (Exhibit B, Work Order dated May 3, 1995; Exhibit E, Contract No. C/5/01200, dated June 10, 1995, Docket Entry #19). At the time of their deaths, Kelly, Carpenter, and Strong were employed as oil well "blow-out specialists" by Boots & Coots, L.P.[2] (Kelly and Carpenter's First Amended Complaint, p.4,

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Additional facts and procedural history on Plaintiffs' claims are set out in the memorandum and recommendation that was entered on October 7, 1997, and the court's orders of October 8, 1997, October 17, 1997, and February 24, 1998. (Docket Entries #31, #32, #34, and #99).

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It is not clear from this record whether Danny Strong was actually employed by Boots & Coots, L.P., Wright, Boots & Coots, L.L.C., or some other entity. (*See* Exhibit D, Plaintiffs' First Amended Original Petition in *Strong, et al. v. Syria Shell Petroleum Development B.V. et al.*, No. 97-29262; Exhibit E, Plaintiffs' Third Amended Original Petition in *Strong et al. v. Boots & Coots Consulting, Inc. et al.*, No. 95-041929, Docket Entry

¶8, Docket Entry #43). Their widows, Annie Kelly, Jeanette Carpenter, and Kathy Strong, individually and as next friend of John Strong, a minor (collectively, "Plaintiffs"), filed suit against these Defendants, originally alleging claims for negligence and gross negligence in connection with that fire. (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9). In February of 1998, Plaintiffs amended their pleadings to add an allegation that Al Furat had breached its contracts with Wright, Boots & Coots, L.L.C. and Boots & Coots, L.P. (Strong's Third Amended Complaint, pp.9-10; Kelly and Carpenter's Second Amended Complaint, pp.9-10).

Al Furat is a "private non-profit making [and] non-asset owning" company that is incorporated under the laws of the Syrian Arab Republic. (Exhibit A, Declaration of Terje T. Olsen ["Olsen Declaration"] ¶2, Docket Entry #6). Its principal place of business is in Syria (Olsen Declaration ¶2). Al Furat was formed pursuant to a Syrian government decree to "develop identified petroleum reserves in Development Lease Areas in the [Syrian Arab Republic]." (Olsen Declaration ¶3).

Syria Shell is a Dutch corporation "with its registred office in The Hague, The Netherlands and with its principal place of business in Syria." (Exhibit F, Affidavit of Wouter G. van Dorp ["van Dorp Affidavit"] ¶2, Docket Entry #6). Syria Shell "is principally engaged in the prospecting for an d the production of liquid and gaseous hydrocarbons and other minerals, and particpates in other companies which engage in similar activities in Syria." (Exhibit G, Declaration of Robbert van der Vlist ["van der Vlist Declaration"] ¶10, Docket Entry

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#6).

#6). "Syria Shell is one of two minority shareholders" in Al Furat. (van Dorp Affidavit ¶2).

Royal Dutch is a "holding company" that is "organized . . . under the laws of The Netherlands with its principal and only place of business in The Hague, The Netherlands." (van der Vlist Declaration ¶¶2, 4). Shell Transport is also a "holding company" that is "organized . . . under the laws of England with its principal and only place of business in London, England." (Exhibit H, Declaration of Jyoti Munsiff ["Munsiff Declaration"] ¶¶2-3, Docket Entry #6). Royal Dutch and Shell Transport "together own, directly or indirectly, investments in various companies known collectively as the 'Royal Dutch/Shell Group of companies.'" (van der Vlist Declaration ¶3; Munsiff Declaration ¶3). Royal Dutch and Shell Transport are, reportedly, the "ultimate parent companies of Syria Shell." (*See* Brief in Support of Motion to Dismiss ["Defendants' Brief"], p.5, Docket Entry #5; van der Vlist Declaration ¶10; Munsiff Declaration ¶10).

In their joint motion to dismiss, Defendants argue that this court has no subject matter jurisdiction over Al Furat because tat entity is immune from suit.[3] (Docket Entry #5,

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This issue was also briefed and argued in the Kelly and Carpenter Plaintiffs' motion to remand. (Docket Entry #12). The Strong Plaintiffs have argued that they were not parties to the motion to remand because their case had not yet been consolidated with Kelly and Carpenter's. They contend that they should not be bound by the ruling on that issue. (Docket Entry #90, p.2). The court notes, however, that the Strong Plaintiffs did have a response on file which addressed whether Al Furat was entitled to immunity under the FSIA, prior to the court's determination of the Kelly and Carpenter motion to remand. (Docket Entry #14 in C.A. No. 97-2322). The arguments and evidence in that response, as well as those included in

pp.8-10). Defendants also contend that this court cannot exercise personal jurisdiction over Syria shell, Shell Transport, and Royal Dutch, because those entities do not have the requisite "minimum contacts" with the forum. (Docket Entry #5, pp.11-16). Finally, Defendants urge, in the alternative, that this case should be dismissed on the grounds of *forum non conveniens* because an adequate and alternative forum exists elsewhere. (Docket Entry #5, pp.20-23). Plaintiffs have responded that both subject matter and personal jurisdiction, as to all Defendants, is proper in this forum. (*See* Docket Entry #25 in C.A. No. 97-2322, Docket Entries #19 and #70 in consolidated C.A. No. 97-2320). Plaintiffs asks that all of these motions to dismiss be denied.

2. Discussion - The Foreign Sovereign Immunities Act ("FSIA")

A. Sovereign Immunity

Al Furat insists that this court lacks subject matter jurisdiction because it is immune under the FSIA. The FSIA provides the exclusive basis for federal jurisdiction over claims against foreign states ands its "agents and instrumentalities". *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA defines a "foreign state" as "a political subdivision of a foreign state or an agency or instrumentality of a foreign state". 28 U.S.C. § 1603(a). "An 'agency or instrumentality of a foreign state' means any entity -

(1) which is a separate legal person, corporate or otherwise, and

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Strong's supplemental pleadings on the issue of FSIA immunity have been considered fully. Based on a review of the entire record, and for the reasons set out below, the court concludes that Plaintiffs have presented no new information which requires a change to its earlier finding.

(2) which is an organ of a foreign state or political subdivision thereof, or a majority whose shares or other ownership interests is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

28 U.S.C. § 1603(b)(1994). Here, Defendants contend that Al Furat is a foreign state under the FSIA because a "majority of its ownership interest" is owned by the Syrian Arab Republic. (Docket Entry #5, p.8). Defendants maintain, in the alternative, that Al Furat meets the definition of an "organ of a foreign state", under 28 U.S.C. §1603(b)(2), and it immune from suit for that reason. (Docket Entry #29, p.6).

1. Majority or "Other Ownership Interest" by a Foreign State

It is undisputed that fifty percent (50%) of Al Furat's stock is owned by Syrian Petroleum. (Exhibit A, Declaration of Terje T. Olsen ["Olsen Declaration"] ¶2, Docket Entry #6). Syrian Petroleum, in turn, is owned entirely by the Syrian Arab Republic. (Exhibit L, Declaration of Dr. Ahmad Mualla ["Mualla Declaration"] ¶2, Docket Entry #6). Plaintiffs argue that because no foreign state owns "more than fifty (50%) of Al Furat's stock, as required by the FSIA, it follows that Al Furat is not entitled to immunity. (Docket Entry #19, p.7). Defendants, recognizing that fifty percent is not a clear majority, contend that Syria's de facto control of Al Furat's affairs "wields more power than ordinary stock ownership and, as such, should be regarded as a majority interest". (Docket Entry #26, pp.7-8). Defendants insist that these "other

ownership interests" are appropriate considerations in determining whether a foreign state owns or controls the majority of a company's shares. (Docket Entry #26, pp.7-8).

In this regard, courts have held that the FSIA' s definition of a foreign state, under 28 U.S.C. §1603, is to be "interpreted broadly". *Kern v. Jeppesen Sanderson, Inc.*, 867 F. Supp. 525, 530 (S.D. Tex. 1994) (*citing Nolan v. Boeing*, 919 F.2d 1015 95th Cir. 1990), *cert. denied*, 499 U.S. 962 (1991)). Further, the Fifth Circuit has stated that the FSIA "erects no explicit bar to the methods by which a foreign state may own an instrumentality, merely requiring that the *entity claiming immunity* - not its parent - have 'a majority of [its] shares or other ownership interest . . . owned by a foreign state or a political subdivision thereof.'" *Linton v. Airbus Indus.*, 30 F.3d 592, 598 n.29 (5th Cir. 1994)(*citing* 28 U.S.C. §1603(b)(2)), *cert. denied*, 513 U.S. 1044 (1994)(emphasis in original). "There is no mention of 'voting' or 'control' majority, thus equitable or beneficial majority ownership is not expressly prohibited from serving." *Linton*, 30 F.3d at 598 n.29.

Defendants point out that Al Furat was formed by the Syrian Arab Republic, pursuant to a government decree, "to develop identified petroleum reserves" within that nation. (Olsen Declaration ¶¶2-3). Al Furat's by-laws also "require that four out of eight members of . . . [its] Board . . . shall be appointed by [Syrian Petroleum][with] one of [those members] always serving as Chairman of the Board." (Olsen Declaration ¶3). Further, because Syrian law, as well as Syrian governmental policy, requires that "all minerals under [the] surface remain the property of the Syrian Arab Republic and will be explored and developed in such a way to best serve the interest of the [Syrian Arab Republic], Syrian Petroleum

Company representative s to [Al Furat's] Board have invariably been [Syrian] Government officials representing the highest level of Government." (Olsen Declaration ¶3). Defendants argue that these factors demonstrate that Syria exercises actual control over Al Furat "as a majority owner", and so its numerical share of stock is not dispositive on that aspect of the FSIA definition. (Docket Entry #6, pp.9-10).

Plaintiffs contend that Al Furat is not a foreign state under the FSIA because the majority of its shares are owned by an instrumentality of Syria, Syrian Petroleum, and not by the Syrian Arab Republic directly. (Docket Entry #19, pp.6-7; Docket Entry #25 in C.A. No. 2322, pp.5-9). In support of that contention, Plaintiffs rely heavily on the decision in *Hyatt Corp. v. Stanton*, 945 F. Supp. 675 (S.D. N.Y. 1996). In *Hyatt*, the district court held that "[a] corporation a majority of whose shares are owned by an agency or instrumentality is not a foreign state under the FSIA." *Id.* at 690 (*citing Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), *cert. denied*, 116 S.Ct. 187 (1995)). However, those circuit courts that have addressed this issue have rejected such a narrow interpretation of the FSIA. *In re Air Crash Disaster Near Roselawn, Indiana*, 96 F.3d 932, 940-41 (7th Cir. 1996)(citations omitted). For instance, the Seventh Circuit held, in *In re Air Crash*, that "the use of 'includes' shows Congress' intent to broadly define 'foreign state'." *Id.* at 940. The court held, therefore, that an entity whose majority shares are owned by an "instrumentality of a foreign state" comes within the FSIA's definition of a foreign state, and that direct stock ownership is not required, as a matter of law. *Id.* at 941 (*citing Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 10 F.3d 425, 427 (7th Cir. 1993); *State Bank of India v. NLRB*, 808 F.2d 526, 535 (7th Cir. 1986), *cert. denied*, 483 U.S. 1005 (1987); *Albertine v. Empresa*

Nicaraguense De La Carne, 705 F.2d 250, 253 (7th Cir. 1983); *Antoine v. Atlas Turner, Inc.*, 66 F.3d 105, 109 (6th Cir. 1995); *Straub v. A.P. Green*, 38 F.3d 448, 451 (9th Cir. 1994); *America West Airlines, Inc. v. GPA Group, Ltd.*, 877 F.2d 793, 795-96 (9th Cir. 1989), *overruled on other grounds, Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 617 (1989); *Gilson v. Republic of Ireland*, 682 F.2d 1022, 1026 (D.C. Cir. 1982)). *See also O'Connell Mach. Co. v. M.V. "Americana"*, 734 F.2d 115, 116 (2d Cir.), *cert. denied.*, 469 U.S. 1086 (1984); *Trump Taj Mahal Assoc. v. Costruzioni Aeronautiche Giovanni Agusta S.p.A.*, 761 F. Supp. 1143, 1150 (D. N.J. 1991), *aff'd without written op.*, 958 F.2d 365 (3d Cir.), *cert. denied*, 506 U.S. 826 (1992). Courts in this district have also recognized that direct ownership is "immaterial" in determing an entity's status as a foreign state under the FSIA. *Delgado v. Shell Oil Co.*, 890 F. Supp. 1315, 1318-19 (S.D. Tex. 1995); *Talbot v. Saipem A.G.*, 835 F. Supp. 352, 353 (S.D. Tex. 1993). Plaintiffs' reliance on the decision in *Hyatt* is, therefore, misplaced in this instance.

To refute Al Furat's *prima facie* evidence of immunity, Plaintiffs point to a map of Syria which purports to show that the ISBA 123 well at issue was a "Shell interest." (Exhibit D, Chart of Competitor Activities, Docket Entry #90, p.6). Relying on this map, Plaintiffs argue that "[o]bviously, there are questions as to whether the Shell organization is dominant to such a degree so as to render Al Furat not majority owned or controlled by a foreign state." (Docket Entry #90, p.6). Likewise, Plaintiffs have presented an "organization chart" which reportedly demonstrates the "chain of command for [the] relief operation" conducted at the ISBA-123 well site in Syria. (Exhibit A, ISB[A]-123 Relief Operations, Docket Entry #90, p.4). Plaintiffs contend that "many of the key named

individuals" on this chart "have Dutch, not Syrian, surnames and are believed to be current or former employees or contractors within the Shell organization." (Docket Entry #90, p.4). Plaintiffs insist that these factors point toward a "substantial issue as to whether the Al Furat organization is run by public employees or by individuals provided for and/or controlled by the private owners of Al Furat." (Docket Entry #90, p.4).

But there is no dispute that Syria Shell has an interest in Al Furat; the evidence shows that Syrian Petroleum owns 50% of Al Furat's stock, and Syria Shell owns 31.25% of the stock (Olsen Declaration ¶2; Docket Entry #5, p.9). The remaining 18.75% is owned by Deminex Syria, a German corporation. (Olsen Declaration ¶2; Docket Entry #5, p.9). Defendants have presented evidence that, in addition to its indirect ownership of 50% of Al Furat's stock, Syria possesses "other ownership interests" which make that entity a foreign state entitled to immunity under the FSIA. 28 U.S.C. §1603(b)(2); *In re Air Crash*, 96 F.3d at 941 (citations omitted); *Linton*, 30 F.3d at 598 n.29. Even assuming for these purposes, without deciding, that Al Furat is not entitled to immunity based on its ownership by a foreign state or political subdivision, that does not end the inquiry in this case. Al Furat has presented evidence, alternatively, to show that it is an organ of a foreign state, pursuant to the FSIA, and entitled to immunity for that reason. It follows, therefore, that even if Defendants' evidence fails on the indicia of control of Syria, the map and the chart that Plaintiffs have presented do not raise an issue that suffices to overcome the showing that Al Furat is

an organ or instrumentality of that nation.[4]

3. Organ of a Foreign State

Defendants also contend that regardless of the stock ownership percentage, or issue of actual control, Al Furat is entitled to immunity under the FSIA because it is an "organ" of the Syrian Arab Republic. (Docket Entry #29, p.6). To determine whether an entity is an organ of a foreign state, under the FSIA, courts consider the following relevant factors: "(1) whether the foreign state created the entity for a national purpose; (2) whether the foreign state actively supervises the entity; (3) whether the foreign state requires hiring of public employees and pays their salaries; (4) whether the entity holds exclusive rights to some [privilege] in the country; and (5) how the entity is treated under foreign state law." *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997)(*citing Corporacion Mexicana de Servicios Maritimos S.A. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996);

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In further support of their argument on the issue of "Shell's dominance" of Al Furat, Plaintiffs point to a decision by the United States Tax Court in *Lansdown v. Commissioner of the Internal Revenue Serv.*, T.C. Memo. 1994-452, 1994 WL 483909 (U.S. Tax Ct.), *aff'd in part and rev'd in part*, 73 F. 3d 373 (10th Cir. 1995)(Table op.). In that case, the issue before the tax court was whether the plaintiff was entitled to a "foreign earned income exclusion" under §911(a) of the Internal Revenue Code. *Lansdown*, 1994 WL 483909. Plaintiffs argue that in *Lansdown*, the court found that employees of Al Furat received benefits from the "Royal Dutch Shell Group". (Hearing dated February 18, 1998). Plaintiffs rely on this finding to support their contention that Shell entities are in actual control of Al Furat. However, it is clear that the *Lansdown* decision did not involve any issue of sovereign immunity and never addresses any implication of the FSIA. That decision is not relevant to this claims and arguments before this court.

Intercontinental Dictionary Series v. De Gruyter, 822 F. Supp. 662, 673 (D.C. Cal. 1993)). Defendants have presented a sworn affidavit from Al Furat's operations chief, Terje T. Olsen, to show that Al Furat was created by a governmental decree of the Syrian Arab Republic. (Olsen Declaration ¶2). Under that decree, Al Furat has the exclusive right to develop and explore the nation's mineral resources. (Olsen Declaration ¶3). Courts have held that "[a] basic attribute of sovereignty is a nation's control over its mineral resources and . . . decisions and conduct concerning them are uniquely governmental in nature." *Jones v. Petty Ray Geophysical Geosource, Inc.*, 722 F. Supp. 343, 347 (S.D. Tex. 1989), *aff'd*, 954 F.2d 1061 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992); *see also MOL, Inc. v. People's Republic of Bangladesh*, 736 F.2d 1326 (9th Cir.), *cert. denied*, 469 U.S. 1037 (1984). Therefore, "[a] sovereign's conduct with respect to its natural resources is presumptively a governmental function." *Jones*, 722 F. Supp. at 346 (citations omitted).

In response to Defendants' contentions, Plaintiffs complain that "the only real evidence on the issue of whether [Al Furat] was created for a national purpose is the declaration of Terje Olsen, the Al Furat operations manager." (Docket Entry #90, p.3). Plaintiffs protest that "[i]t is completely unknown to what extent, if at all, Mr. Olsen can speak for the Syrian government, or whether any of his conclusory statements about the creation of Al Furat are correct." (Docket Entry #90, p.3). Unfortunately, Plaintiffs have offered no reason to question whether Olsen is not credible or that, as Al Furat's operations manager, he is not qualified to testify about that company's structure. Nor have they shown there is any support, in law, for a blanket disregard of the sworn statements of a declarant in the absence of such a question. Further,

Olsen's declaration is supported by a sworn affidavit from Syrian Petroleum's chief executive officer, Dr. Eng. Ahmad Mualla, on that entity's ownership and treatment under Syrian law. (Exhibit L, Declaration of Dr. Eng. Ahmad Mualla ["Mualla"], Docket Entry #6). The court concludes, therefore, that Plaintiffs' objections on this ground are without merit.

Further, it is to be noted that at least one court in this circuit has previously decided that Al Furat is an instrumentality of a foreign state under the FSIA. In *Ebrahim v. Shell Oil Co.*, the district court determined that Syrian Petroleum "is the arm of the Syrian government that developes that nation's mineral patrimony" and found as follows:

> The board of directors of Al Furat is controlled by the Syrian government through [Syrian Petroleum]. Syria retains title to the sub-surface minerals in Syria. Al Furat exists as a means for Syria to exploit Syrian resources in Syria, as a direct governmental policy.

Ebrahim v. Shell Oil Co., 847 F. Supp. 65, 67 (S.D. Tex. 1994). The court concluded, on that basis, that "Al Furat is an instrumentality of Syria" under the FSIA. *Id.* That reasoning is equally persuasive in this instance.

From this record, the court concludes that Al Furat is as "an organ of a foreign state" under the FSIA. *Supra Medical Corp. v. McGonigle*, 955 F. Supp. 374, 379 (E.D. Pa. 1997)(*citing Corporacion Mexicana de Servicios Maritimos, S.A. v. M/T Respect*, 89 F.3d 650, 654-55 (9th Cir. 1996); *Intercontinental Dictionary Series v. De Gruyter*, 822 F. Supp. 662, 673 (D.C. Cal. 1993)); *see also Ebrahim*, 847 F. Supp. at 67. Therefore, unless Plaintiffs can show that an exception to immunity exists, Al Fuat is entitled to protection from this suit under the FSIA. 28 U.S.C. §1604.

B. Exceptions to Sovereign Immunity under the FSIA

It is well settled that, in the absence of some exception, the FSIA entitles foreign states to immunity from suits in the courts of the United States. 28 U.S.C. §1604; *Saudi Arabia v. Nelson*, 507 U.S. 349, 351 (1993). Once it is determined that a foreign defendant is a foreign state, under the FSIA, "[a]n exception to foreign sovereign immunity must exist to [support] subject matter jurisdiction." *Gould*, 853 F.2d at 450. Exceptions to immunity exist in the following circumstances: (1) "the foreign state has waived its immunity"; (2) "the action is based upon a commercial activity" by the foreign state; (3) the case involves "rights in property taken in violation of international law" or "rights in property in the United States acquired by succession or gift"; (4) suits for "money damages . . . against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States; (5) " an agreement made by the foreign state with of for the benefit of a private party to submit to arbitration" in the United States; and (6) a suit for "money damages . . . against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such act". 28 U.S.C. §1605(a). "The foreign state bears the burden of persuasion on the issue of immunity under the FSIA, but once a *prima facie* showing of immunity has been made, the plaintiff seeking to litigate in the district court bears the burden of coming forward with facts showing that an exception applies. " *Moran*, 27 F.3d at 172 (*citing Walter Fuller Aircraft Sales v. Republic of the Phillippines*, 965 F.2d 1375, 1383 (5th Cir. 1992)); *see also Brown v. Valmet-Appleton*, 27 F.3d 860, 862 n.7 (5th Cir. 1996)(citations omitted).

In this instance, Plaintiffs contend that "Al Furat's activities . . . fall withing the commercial activity exception to the FSIA and", therefore, "Al Furat does not . . . enjoy immunity as provided by that statute." (Strong's Third Amended Complaint, p.11). Plaintiffs claim that Kelly, Carpenter, and Strong were killed by a fire at a Syrian oil and gas well, that resulted from "negligence and gross negligence by Defendants." (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9). Plaintiffs complain further that in Al Furat's "fail[ure] to comply with and enforce contractual obligations for safe-work practices", and in its "fail[ure] to warn the Plaintiffs that they would not enforce such practices, Al Furat breached its contracts with Wright Boots & Coots and Boots & Coots L.P." (Strong's Third Amended Complaint, pp.9-10; Kelly and Carpenter's Second Amended Complaint, p.9). Plaintiffs claim that Al Furat's "failure to comply with and enforce [these] contractual obligations was a proximate cause of the death of [Danny Strong, Martin Kelly, and John Carpenter]." (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9).

1. Commerical Activity Exception

The "commercial activity" exception to the FSIA provides that a foreign state is not immune from suit in the following circumstances:

> . . . in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or
> upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
> upon an act outside the territory of the United States in

> connection with a commercial activity of the foreign state elsewhere and that causes a direct effect in the United States.

28 U.S.C. §1605(a)(2). Plaintiffs insist that the commercial activity exception applies because this action is based both "upon a commercial activity carried on in the United States" and "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere". (Docket Entries #97 and #98). Al Furat disputes, however, whether Plaintiffs' action is truly "based upon" a "commercial activity". (Docket Entry #94, p.3).

"Commercial activity" is defined under the FSIA as follows:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. §1603(d). The United States Supreme Court has explained that the FSIA "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." *Saudi Arabia v. Nelson*, 507 U.S. 349, 359 (1993)(*citing Weltover*, 504 U.S. at 612). "Under the restrictive, as opposed to the 'absolute' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*) but not to those that are private or commercial in character (*jure gestionis*)." *Nelson*, 507 U.S. at 361 (*citing Verlinden*, 461 U.S. at 487; *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976)). In *Republic of Argentina v. Weltover, Inc.*, the Court held that, under this

"restrictive theory" of sovereign immunity, a foreign state "engages in commercial activity under the [FSIA] where it exercises only those powers that can also be exercised by private citizens' as distinct from those powers peculiar to sovereigns." 504 U.S. 607, 614 (1992); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987). "Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of private player within the market.'" *Weltover*, 504 U.S. at 614 (citation omitted). The Court has emphasized that "whether a [foreign] state acts 'in the manner' of a private party is a question of behavior, not motivation", as follows:

> [B]ecause the [FSIA] provides that the commercial character of the act is to be determined by reference to its nature rather that its 'purpose,' the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether the particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'

Nelson, 507 U.S. at 360-61 (*quoting Weltover*, 504 U.S. at 614)(emphasis in original).

Here, Plaintiffs insist, and this court does not necessarily disagree, that the contracts entered into with Wright, Boots & Coots, L.L.C., and Boots & Coots L.P. "make clear that the activities in question by Al Furat are commercial in nature." (Docket Entry #90, p.8). Those contracts were

"[f]or the provision of [b]lowout response and [w]ell [k]illing [s]ervices." (Exhibit E, Work Order for Boots & Coots L.P., dated May 5, 1995 ["Work Order"]; Exhibit F, Contract No. C/5/01200 between Al Furat Petroleum Company and Wright Boots & Coots, dated June 10, 1995 ["Contract No. C/5/01200"], Docket Entry #90). Plaintiffs point out Al Furat was obligated to monitor all of the work performed under the contracts and to "stop or suspend any item of work" if necessary. (Contract No. C/5/01200, §4.41). Al Furat was responsible for setting safety standards and had "complete authority, dominion and control over the well site, the well involved, and the drilling and related equipment there located . . ." (Work Order ¶2; Contract No. C/5/01200, §2.21). Plaintiffs claim that they have suffered "harm based upon Al Furat's failure to discharge its obligations properly under such contracts." (Docket Entry #90, p.8). They argue that these factors fit within the commercial activity exception and so Al Furat is not entitled to sovereign immunity under the FSIA. (Docket Entry #90, p.8).

It is true that "contracts for the procurement of goods and services" are a commercial activity, "rather than governmental in nature." *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1384 (5th Cir. 1992)(*citing Weltover*, 504 U.S. 607 (1992)(citations omitted). The FSIA's legislative history also details that "the making of 'a single contract' in the United States can support" a finding that the commercial activity exception applies. *Id.* (*quoting* H.R. Report No. 1487, 94th Cong., 2nd Sess. 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615). Under the commercial activity exception to the FSIA, if it is shown that a contractual duty "ar[ises] from commercial activity in the United States, then United States courts have [subject matter] jurisdiction, even if

the acts that breached the duty occurred elsewhere." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 893 (7th Cir. 1991). Therefore, breach of contract, entered into in the United States, "provides [subject matter] jurisdiction for a claim for breach of that agreement." *Santos*, 934 F.2d at 894. "By contrast, however, a foreign government is not susceptible to subject matter jurisdiction in the courts for the United States for breaching a contract that was "executed in the [foreign] country". *Id.* (*citing Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1512 (D.C. Cir. 1988)).

Here, the evidence is clear that the contracts at issue were executed in the cities of Omar and El Isba, Syria. (Exhibit B, Work Order dated May 3, 1995; Exhibit E, Contract No. C/5/01200, dated June 10, 1995, Docket Entry #19). For that reason, these cannot contracts form the basis for subject matter jurisdiction in the United States, even under the commercial activity exception to the FSIA. *Santos*, 934 F.2d at 894; *Zedan*, 849 F.2d at 1512-14.

Further, a review of the two contracts upon which Plaintiffs rely shows that the parties to those agreements are Al Furat, Boots & Coots L.P., and Wright Boots & Coots, L.L.C. (Contract No. C/5/01200; Work Order). Neither Boots & Coots, L.P. nor Wright, Boots & Coots, L.L.C. have been joined in this dispute. Nor were Plaintiffs subject to the rights and obligations that are set out in those written agreements. Plaintiffs appear to argue that they are "third-party beneficiaries" of these contracts and, because the injuries complained of were proximately caused by Al Furat's alleged "failure to comply with and enforce [its] contractual obligations", they have standing to recover from Al Furat, directly, for its breach. (Kelly and Carpenter's Second Amended Complaint, p.2, 8-9; Strong's Third Amended

Complaint, p.2, 9-10). Plaintiffs have not cited any support for this theory of recovery and this court is reluctant to endorse it in these circumstances. Indeed, Texas law is settled that "[a] third party can only recover if the contracting parties intended to benefit that party, 'and only if the contracting parties entered into the contract directly and primarily for the third party's benefit.'" *Loyd v. Eco. Resources, Inc.*, 956 S.W.2d 110, 134 (Tex. App.-Houston [14th Dist.] 1997, n.w.h.)(*quoting Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.*, 880 S.W.2d 417, 421 (Tex. App.-Houston [14th Dist.] 1993, writ denied)). The mere fact that a person is "affected by the parties' conduct, or that he 'may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary'", as a matter of law. *Loyd*, 956 S.W.2d at 134 (*quoting Merrimack Mut. Fire Ins. Co. v. Allied Fairbanks Bank*, 678 S.W.2d 574, 577 (Tex.App.-Houston [14th Dist.] 1984, writ ref'd n.r.e)). It does not appear, from these facts, that Plaintiffs are true third-party beneficiaries to the contracts between Al Furat and Boots & Coots L.P. and Wright Boots & Coots L.L.C. and their right to enforce any term, or to recover damages, because of an alleged breach of those agreements, is uncertain.

Moreover, a careful review of the pleadings reveals that Plaintiffs' suit actually sounds in tort, and not in contract. Plaintiffs complain of the following incidents of "misconduct in operating the well":

(1) failure to provide adequate water at the well site;

(2) failure to provide [an] adequate water pump at the well site;

(3) failure to secure alternative sources for water at the well site;

(4) failure to approve the expenditure of equipment necessary to perform well control operations;

(5) failure to provide adequate, qualified personnel to perform operations at the well control site;

(6) failure to provide adequate well control planning and procedures through qualified management;

(7) failure to have any preplanned contingency for escape for those working on the well site;

(8) failure to employ other contractors with the necessary expertise to assist in the well control operations;

(9) failure to maintain the well-site which was under their dominion and control in a reasonably safe condition;

(10) failure to monitor the work practices of persons working at the well-site in order to ensure that contractors were complying with contractually required work practices and safety standards;

(11) failure to monitor relevant work and stop said work when appropriate;

(12) failure to properly set, implement, and enforc[e] safety standards for contractors on the job.

(Strong's Third Amended Complaint, pp.7-8; Kelly and Carpenter's Second Amended Complaint, pp.7-8). Plaintiffs alleged, expressly, that these acts constitute negligence and gross negligence. (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9). While Plaintiffs have recently added breach of contract allegations against Al Furat, for "failing to enforce safe work practices" and "failing to warn that they would not enforce such practices", it is clear that, in truth, their claims stem from

personal injuries that resulted from any negligent acts or omissions. "Those torts, and not the arguably commercial activities that preceded their commission, form the basis for [Plaintiffs'] suit." *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993). "To give jurisdictional significance to this feint of language would effectively thwart the [FSIA's] manifest purpose to codify the restrictive theory of sovereign immunity." *Id.* at 363.

Because Plaintiffs have not shown that the commercial activity exception to the FSIA applies in this case, Al Furat is entitled to the protection that statute provides and this court has no subject matter jurisdiction. Accordingly, Al Furat's motion to dismiss on that issue should be granted.

2. Waiver

Alternatively, Plaintiffs claim that Al Furat has waived any immunity it may be entitled to by "entering into contracts which call for the enforcement of . . . obligations in Houston, Harris [C]ounty, Texas." (Strong's Third Amended Complaint, p.11; Kelly and Carpenter's Second Amended Complaint, p.11). Plaintiffs argue that because that act "comtemplat[es] the participation of the American Courts", Al Furat should be subject to suit in this forum. (Plaintiffs' Response, p.19). Plaintiffs correctly point out that the FSIA provides an exception to sovereign immunity in any case "in which the foreign state has waived its immunity either explicitly or by implication". 28 U.S.C. §1605(a)(1). The Fifth Circuit has held, however, that "[t]he implicit waiver clause of [the FSIA] has been . . . narrowly construed; courts rarely find that a nation has waived its sovereign immunity without strong evidence that this is what the foreign state intended." *Rodriguez v. Transnave, Inc.*, 8 F.3d 284, 287 (5th Cir. 1993)(*citing Frolova v. Union of Soviet Socialist Republics*, 761 F.2d 370, 377 (7th

Cir. 1985)). Further, the legislative history of the FSIA details that "implicit waivers" have been found in the following circumstances only: "(1) a foreign state agrees to arbitration in another country; (2) the foreign state agrees that a contract is governed by the laws of a particular country; or (3) the state files a responsive pleading without raising the immunity defense." *Rodriguez*, 8 F.3d at 287 (5th Cir. 1993)(*citing* H. Rep. No. 1487, 94th Cong. 2d Sess. 18; *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 539 & n.22 (5th Cir.), *cert. denied*, 506 U.S. 956 (1992)). Plaintiffs have made no showing that any of those factors are present here. Likewise, Plaintiffs have presented no "strong evidence" that Al Furat intended to waive its sovereign immunity by entering into a contract with Boots & Coots, L.P. *Rodriguez*, 8 F.2d at 287. As there is no showing that Al Furat waived its rights under the FSIA, Plaintiffs have not demonstrated that this exception to immunity applies. Because this court lacks subject matter jurisdiction over Al Furat, its motion to dismiss for that reason should be granted.

3. Discussion - Personal Jurisdiction

Defendants Syria Shell, Royal Dutch, and Shell Transport contend that this court lacks personal jurisdiction over them and so Plaintiffs' action must be dismissed, under Rule 12(b)(2) of the Federal Rules of Civil Procedure. (Defendants' Motion, p.2). Each of these Defendants claims that it does not have the requisite minimum contacts with the State of Texas that would allow a proper exercise of jurisdiction in this forum. (Defendants' Motion, p.2). "When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the

nonresident." *Allied v. Moore & Patterson*, 117 F.3d 278, 281 (5th Cir. 1997)(citations omitted). "The court may determine the jurisdictional issue by receiving affidavits, interrogatories, depositions, oral testimony, or any combination of the recognized methods of discovery." *Id.* A federal court has personal jurisdiction over a nonresident defendant to the same extent that a state court in that forum has such jurisdiction. *Id. Gundle Lining Const. Corp. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996); *Wilson v. Belin*, 20 F.3d 644, 646 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994). The extent of jurisdiction, for a federal court sitting in Texas, will depend upon the following: (1) the Texas long-arm statute, and (2) the due process clause of the fourteenth amendment. *Gundle*, 85 F.3d at 281: *Belin*, 20 F.3d at 646; *Villar v. Crowley Maritime Corp.*, 990 F.2d 1489, 1495 (5th Cir. 1993), *cert. denied*, 114 S.Ct. 690 (1994); *Interfirst Bank Clifton v. Fernandez*, 844 F.2d 279, 282 (5th Cir. 1988); *Product Promotions, Inc. v. Cousteau*, 495 F.2d 483, 489 (5th Cir. 1974). The Texas long-arm statute has been held to reach the constitutional limits of the due process clause. TEX. CIV. PRAC. & REM. CODE ANN. § 17.042 (Vernon 1986); *Schlobohm v. Shapiro*, 784 S.W.2d 355, 357 (Tex. 1990). "Because the Texas long-arm statute grants Texas courts the power to exercise jurisdiction whenever constitutional, the sole question before the district court [is] whether the district court [can] constitutionally exercise jurisdiction over the foreign defendants." *Villar*, 990 F.2d at 1495-1496 (*citing Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992); *Schlobohm*, 784 S.W.2d at 357). The necessary two-step inquiry thus "collapses" into an analysis of whether an exercise of jurisdiction over the defendant would "impinge on their individual liberty interests - not to be subjected to suits in a distant forum with which they have little

connection - that are protected by the due process clause." *Belin*, 20 F.3d at 647.

Before the court can properly exercise jurisdiction over the nonresident defendants here, two threshold requirements must be satisfied. First, it must be shown that the nonresident defendants purposely availed themselves of the benefits and protections of the forum state by establishing "minimum contacts" with it. *Gundle Lining*, 85 F.3d at 204 (*citing International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A defendant's conduct and connection with the forum must be such that it should reasonably anticipate being haled into court in the forum state. *Gundle Lining*, 85 F.3d at 204 (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980)). Second, there must be a showing that an exercise of such jurisdiction over the nonresident defendants will not offend "traditional notions of fair play and substantial justice." *Id.; Belin*, 20 F.3d at 647 (*citing Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987))(citations omitted).

A. Minimum Contacts

"Minimum contacts" that have been established with the forum state can justify an exercise of either "specific" or "general" personal jurisdiction over a nonresident. *Belin*, 20 F.3d at 647; *Fernandez*, 844 F.2d at 283 (*citing Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)). The requirements of specific jurisdiction are satisfied if a nonresident defendant's contacts with the forum state are both "continuous and systematic", even if its contacts are not directly related to the cause of action. *Belin*, 20 F.3d at 647; *Villar*, 990 F.2d at 1496 (citations omitted). "[T]o establish general personal jurisdiction over the defendant, the plaintiff must prove that the defendant has more substantial contacts

with the forum" than those that are required when specific jurisdiction is at issue. *Villar*, 990 F.2d at 1496. Plaintiffs' only contention here is that this court may properly exercise specific personal jurisdiction over Syria Shell, Shell Transport, and Royal Dutch. (Kelly and Carpenter's Second Amended Complaint, pp. 2-3, 10; Strong's Third Amended Complaint, pp.2-3, 10). Defendants insist, however, that neither specific nor general personal jurisdiction exists. (Docket Entry #5, pp.13-16).

1. Specific Jurisdiction

One who has "purposely directed his activities at residents of the forum" may find himself subject to the specific jurisdiction of courts sitting in that state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)(*citing Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). "[W]ith respect to interstate contractual obligations . . . parties who 'reach beyond one state and create continuing relationships and obligations with citizens of another sate' are subject to regulation and sanctions in the other state for the consequences of their activities." *Burger King*, 471 U.S. at 473 (*quoting Travelers Health Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). To exercise specific jurisdiction, properly, "the court must examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends traditional notions of fair play and substantial justice." *Gundle Lining*, 85 F.3d at 205 (*citing Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The fact that a nonresident defendant is physically absent from the forum state does not, alone, determine whether the forum can exercise personal jurisdiction over him. *Burger King*, 471 U.S. at 476. On the other hand, the mere fact that a contract was executed in the forum state is, in itself, insufficient to establish the necessary "minimum

contacts." *Id.* at 478.

Plaintiffs have the burden to establish the court's jurisdiction over the foreign Defendants in this action. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992). Plaintiffs contend that specific personal jurisdiction is present because Al Furat was acting as the "agent" or "alter ego" of Syria Shell, Shell Transport, and Royal Dutch, when it entered into contracts for well control services with Boots & Coots L.Pl. and Wright, Boots & Coots, L.L.C., both Texas companies. (Kelly and Carpenter's Second Amended Complaint, pp. 2-3, 10; Strong's Third Amended Complaint, pp.2-3, 10). Because the current allegations contain no mention of any direct contact with the forum by Syria Shell, Shell Transport, or Royal Dutch, Plaintiffs implicitly concede that these Defendants had no such direct contacts in Texas. (*See* Kelly and Carpenter's Second Amended Complaint, Docket Entry #92; Strong's Third Amended Complaint, Docket Entry #89). Personal jurisdiction over these Defendants can exist in this instance only if Al Furat's contacts can be attributed to them. *Gundle Lining*, 85 F.3d at 208-09; *Villar*, 990 F.2d at 1493; *Dalton v. B & W Marine, Inc.*, 897 F.2d 1359, 1361 (5th Cir. 1990); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763, 773 (5th Cir. 1988); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983); *Walker v. Newgent*, 583 F.2d 163, 166-67 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Cousteau*, 495 F.3d at 492-93. The United States Supreme Court has held that foreign agencies and instrumentalities are to be accorded a presumption of independent status. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba ["Bancec"]*, 462 U.S. 611, 626-27 (1983). The Court held that this presumption is overcome only where "internationally recognized equitable principles" require

a disregard of the corporate form to avoid injustice. *Bancec*, 462 U.S. at 627, 633; *Waller Fulle Aircraft Sales, Inc. v. Republic of the Phillippines*, 965 F.2d 1375, 1381 (5th Cir. 1992); *Gabay v. Mostazafan Found. of Iran*, 151 F.R.D. 250, 253 (S.D. NY 1993). The Court detailed two situations in which that presumption might be overcome: (1) where "a corporate entity is so extensively controlled by its owner that a relationship of principal and agent is created"; or (2) where recognition of the separate identity of the agency or instrumentality "would work fraud or injustice." *Bancec*, 462 U.S. at 629. "[W]here, as here, jurisdiction depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship." *Arriba*, 962 F.2d 534 (citations omitted). It is alleged here that the sovereign was acting as an agent for other, private entities. Plaintiffs contend that Al Furat's isolated contacts with the State of Texas can be attributed to Syria Shell, Shell Transport, and Royal Dutch, and so this court may exercise specific personal jurisdiction over these defendants, as well. (Kelly and Carpenter's Second Amended Complaint, p.2; Strong's Third Amended Complaint, p.2).

Plaintiffs argue, specifically, that Al Furat recruited Wright, Boots & Coots L.L.C. and Boots & Coots, L.P. for employment in Syria, and that the Texas long arm statute allows an exercise of specific personal jurisdiction in such an instance. (Docket Entry #19, pp.10-13; Hearing on January 29, 1998 and February 18, 1998). The Texas long-arm statute does permit an exercise of personal jurisdiction over nonresidents that do business it the forum. A nonresident is "doing business" in Texas if it engages in any of the following actions:

> (1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in

whole or in part in this State;

(2) commits in tort in whole or in part in this state; or

(3) recruits Texas residents, directly, or through an intermediary located in this state, for employment inside or outside the state.

TEX.CIV.PRAC. & REM. CODE ANN. § 17.042.

In light of Plaintiffs' arguments, Defendants respond that neither these Plaintiffs, nor the decedents, were ever specifically employed or recruited by Al Furat. (Hearing on February 18, 1998). Instead, those hiring details were executed by one of the non-parties, Wright, Boots & Coots L.L.C. or Boots & Coots, L.P. (Work Order; Contract No. C/5/01200). Because neither Boots & Coots, L.P. nor Wright, Boots & Coots, L.L.C. are parties to this dispute, it is unclear whether their actions have any colorable impact on this jurisdictional dispute. Plaintiffs have provided no case law to support this aspect of their argument on a proper exercise of personal jurisdiction that is based on the recruitment of Texas residents by a non-resident defendant. Instead, they contend that Plaintiffs are "third-party beneficiaries" of the contracts with Wright, Boots & Coots L.L.C. and Boots & Coots L.P. and that the injuries complained of are a proximate result of Al Furat's "failure to comply with and enforce ([its] contractual obligations". (Kelly and Carpenter's Second Amended Complaint, p.2, 8-9; Strong's Third Amended Complaint, p.2, 9-10; Docket Entry #90, p.8). However, as noted, it is not apparent that the parties to the contracts "intended to benefit" these Plaintiffs, and so they have no right to recover from Al Furat for a breach, if any, of those agreements. *Loyd*, 956 S.W.2d at 134 (citations omitted).

Further, a review of those contracts which Plaintiffs

claim are the basis for an exercise of specific personal jurisdiction, shows that they were both executed in Syria. (*See* Olsen Declaration ¶¶6-8; Exhibit E, Work Order dated May 3, 1995; Exhibit F, Contract No. C/5/01200 dated June 10, 1995, Docket Entry #90). More importantly, it was agreed that the contracts are to be governed by Syrian law. (Exhibit F, Contract No. C/5/01200 dated June 10, 1995, Art. 10, 11, Docket Entry #90). The Fifth Circuit has "recognized that the place of contracting and the law governing the contract, while not necessarily determinative, are relevant factors for determining purposeful activity." *Jones*, 954 F.2d at 1069 (*citing Southwest Offset, Inc. v. Hudco Publ'g Co.*, 622 F.2d 149, 152 (5th Cir. 1982)). Although Al Furat undeniably agreed to make payments to Boots & Coots L.P. and Wright Boots & Coots in Houston, Texas, and to provide indemnification to those companies if loss or damage occurred in the performance of the agreements, the well control services that are the subject of the contracts were to be performed in Syria. (Exhibit B, Work Order dated May 3, 1995; Exhibit E, Contract No. C/5/01200 dated June 10, 1995, Docket Entry #19). The Fifth Circuit has held, in like circumstances, that if the "material performance" of a contract occurs outside the forum, the fact that payments were mailed into the forum "does not weigh heavily" in the determination of whether an exercise of specific personal jurisdiction is proper. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987)(citations omitted).

Assuming for these purposes, but not deciding, that Al Furat is found to be the alter ego of Syria Shell, Shell Transport, and Royal Dutch, its isolated act in contracting with a Texas company is not sufficient to establish specific personal jurisdiction over these Defendants. *Burger King*, 471 U.S. at

476; *Belin*, 20 F.3d at 649; *Jones*, 954 F.2d at 1069; *Holt*, 801 F.2d at 778; *Hydrokinetics*, 700 F.2d at 1029-30. It is true, as Plaintiffs argue, that "[a] single act by the defendant directed at the forum state . . . can be enough to confer [specific] personal jurisdiction *if* that act gives rise to the claim being asserted." *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993)(citation omitted)(emphasis added). But it is likewise well settled that, "when the act or transaction being sued upon is unrelated to the defendant's contacts with the forum state, personal jurisdiction does not exist unless the defendant has sufficient 'continuous and systematic contacts' with the forum state to support an exercise of 'general jurisdiction.'" *Id.* It is important to note that Plaintiffs' claims here center on alleged breaches, acts, and omissions that were committed at the well site in Syria. (Kelly and Carpenter's Second Amended Complaint, p.9; Strong's Third Amended Complaint, pp.9-10). Because the deaths of Kelly, Carpenter, and Strong are not related to Al Furat's activities in the United States, Plaintiffs must be able to demonstrate, alternatively, that Syria Shell, Shell Transport, and Royal Dutch have "sufficient 'continuous and systematic contacts' with the forum state to support an exercise of 'general jurisdiction.'" *Ruston*, 9 F.3d at 419. For the reasons that follow, Plaintiffs have failed to make this alternative showing.

2. General Jurisdiction

"[W]here the defendant's forum activities are continuing and systematic, jurisdiction may be proper without a relationship between a defendant's particular act and cause of action." *Jones v. Petty-Ray Geophysical Geosources, Inc.*, 954 F.2d 1061, 1068 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992)(*citing Helicopteros*, 466 U.S. at 414 n.9). When general jurisdiction is alleged, the inquiry is more broad and

demanding and requires that a greater amount of substantial activities in the forum state be shown. *Jones*, 954 F.2d at 1068. More than an occasional business transaction is required. *Polythane Systems, Inc. v. Marina Ventures Int'l Ltd.*, 993 F.2d 370, 374 (5th Cir. 1987)(*citing Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952)).

Syria Shell, Shell Transport, and Royal Dutch insist that an exercise of general jurisdiction is not proper, as a matter of law, because they have had no "systematic and continuous" contacts with Texas. (Docket Entry #5, p.15). In support, Syria Shell, Shell Transport, and Royal Dutch have presented the following evidence:

(1) Syria Shell, Shell Transport, or Royal Dutch are not incorporated under the laws of the United States, and none of those entities has a principal place of business in the United States.

(2) Syria Shell, Shell Transport, or Royal Dutch do not have a registered agent for service of process in the State of Texas, nor are they required to.

(3) Syria Shell, Shell Transport, or Royal Dutch do not reside in, or maintain offices in, the State of Texas.

(4) Syria Shell, Shell Transport, or Royal Dutch do not have employees or agents doing business on their behalf in the State of Texas.

(5) Syria Shell, Shell Transport, or Royal Dutch have not sold goods or services, or contracted to sell goods or services, in Texas, nor have they committed

any tort, in whole or in part, within the State of Texas.

(van der Vlist Declaration ¶¶2, 5; Munsiff Declaration ¶5; van Dorp Declaration ¶¶2, 4).

Plaintiffs' allegations have not controverted this evidence in any way. They have, therefore, failed to make a showing that Syria Shell, Shell Transport, or Royal Dutch have "substantial" or "continuous and systematic" contacts with the forum that would warrant an exercise of general jurisdiction over them. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993)(citations omitted). The court notes as well that even had the requisite contacts been shown to exist, it is doubtful that due process considerations would otherwise support an exercise of specific or general jurisdiction over these foreign defendants.

B. Fair Play and Substantial Justice

The second element required to establish a proper exercise of personal jurisdiction is proof that, in doing so, the court would not "offend traditional notions of fair play and substantial justice" in accord with the due process clause of the United States Constitution. *Belin*, 20 F.3d at 647 (citations omitted). If a defendant has been found to have purposefully directed his actions toward the forum state, then that defendant has the burden to present "a compelling case that the presence of some other consideration would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Typically, courts consider the following factors in making this determination:

1. the burden on the defendant;
2. the forum state's interest in adjudicating the dispute;
3. the plaintiff's interest in maintaining convenient

and effective relief;

4. the interstate judicial system's interest in obtaining the most efficient resolution of controversies;
5. the shared interest of the several states in furthering fundamental substantive social policies.

Fernandez, 844 F.2d at 284; *Burger King*, 471 U.S. at 477. Here, Syria Shell, Shell Transport, and Royal Dutch argue that an exercise of personal jurisdiction would be unfair because "none have purposefully interjected themselves into Texas, and all the events underlying the incident made the basis of this suit took place outside of" the forum. (Docket Entry #5, p.17). Syria Shell, Shell Transport, and Royal Dutch maintain that "because neither the incident made the basis for this lawsuit nor any of the conduct relevant to this action occurred in Texas, the majority of the witnesses and evidence will be located outside the state." (Docket Entry #5, p.17). Thus, not only would these Defendants be forced to travel great distances to defend this action in Texas, documents and witnesses would have to be transported here from Syria, The Netherlands, and England." (Docket Entry #5, pp.17-18). Syria Shell, Shell Transport, and Royal Dutch contend that "[i]t would be inefficient and burdensome to conduct discovery and a trial in Texas when all the witnesses and evidence are outside the state." (Docket Entry #5, p.18). Syria Shell, Shell Transport, and Royal Dutch argue, therefore, that "the burden on the[se] overseas Defendants, who are located in Syria, The Netherlands, and England, in having to defend themselves in Texas would be great." (Docket Entry #5, p.17).

The Fifth Circuit has recognized that "Texas has no

'special interest' in granting relief to its citizens against a foreign corporation on a cause of action that arose under the laws of a foreign government for conduct outside the United States." *Jones*, 954 F.2d at 1070 (*citing Reich v. Signal Oil & Gas Co.*, 409 F. Supp. 846, 851 (S.D. Tex. 1974), *aff'd without written op.*, 530 F.2d 974 (5th Cir. 1976)). Considering the evidence and the arguments as a whole, Plaintiffs have not satisfied their threshold burden to show that Syria Shell, Shell Transport, and Royal Dutch have the requisite "minimum contacts" with the forum state to allow the court a proper exercise of personal jurisdiction. Even had those minimum contacts been established, Syria Shell, Shell Transport, and Royal Dutch's connection with this forum is so remote that it would be unfair and unreasonable to maintain the suit here. *Jones*, 954 F.2d at 1069-70. As Defendants point out, Syria Shell, Shell Transport, and Royal Dutch's connections with Texas are nonexistent. (van der Vlist Declaration ¶¶2, 5; Munsiff Declaration ¶5; van Dorp Declaration ¶¶2, 4). Further, a review of Al Furat's contracts with Boots & Coots, L.P. and Wright, Boots & Coots, L.L.C., reveals no justification for an exercise of personal jurisdiction here over those other entities. Because Plaintiffs have not shown that Syria Shell, Shell Transport, and Royal Dutch have the requisite minimum contacts in this forum, they have failed to make a *prima facie*, case that either general or specific personal jurisdiction exists in this instance. Accordingly, Defendants' motion to dismiss for lack of personal jurisdiction should be granted.

4. Discussion - *Forum Non Conveniens*

Syria Shell, Shell Transport, and Royal Dutch also contend, in the alternative, that this case should be dismissed, under the doctrine of *forum non conveniens*, because Syria, and not Texas, is the most convenient forum. (Defendants' Motion,

p.2). "A court's authority to effect foreign transfers through the doctrine of *forum non conveniens* 'derives from the court's inherent power, under Article III of the Constitution, to control the administration of the litigation before it and to prevent its process from becoming an instrument of abuse, injustice, or oppression.'" *Baumgart v. Fairchild Aircraft Corp.*, 981 F.2d 824, 828 (5th Cir. 1993)(*quoting In re Air Crash Disaster Near New Orleans, La.*, 821 F.2d 1147, 1155 (5th Cir. 1987), *aff'd in part, vacated in part*, 490 U.S. 1032 (1989), *vacated sub. nom. Pan Am World Airways, Inc. v. Lopez*, 490 U.S. 1032 (1989), *reinstated save as to damages under original nom.*, 883 F.2d 17 (5th Cir. 1989); and *Koster v. Lumbermens Mut. Cas. Co.*, 330 U.S. 518 (1947)). Through this power, a district court "may decline to exercise it jurisdiction, even though the court has jurisdiction and venue, when it appears that the convenience of the parties and the court and the interests of justice indicate that the action should be tried in another forum." *Baumgart*, 981 F.2d at 828 (*citing Piper Aircraft v. Reyno*, 454 U.S. 235, 250 (1981); *Koster*, 330 U.S. at 530; and *Gulf Oil Co. v. Gilbert*, 330 U.S. 501, 507 (1947)). A dismissal for *forum non conveniens*, is not a "refusal to hear a case for lack of jurisdiction . . . it is a discretionary refusal to exercise jurisdiction that plainly does not exist." *Baris v. Sulpicio Lines, Inc.*, 74 F.3d 567, 572 (5th Cir.1996), *cert. denied sub. nom. Caltex Petroleum Corp. v. Baris*, 117 S.Ct. 1460 (1997)(citations omitted). In this instance, because this court concludes that jurisdiction over Al Furat, Syria Shell, Shell Transport, and Royal Dutch, does not "plainly" exist, the motion for *forum non conveniens* need not be reached. *Baris*, 74 F.3d at 572.

5. <u>Conclusion</u>

Based on the foregoing, it is

RECOMMENDED that Al Furat's motion to dismiss for lack of subject matter jurisdiction (Docket Entry #4) be GRANTED. It is further,

RECOMMENDED that Syria Shell, Shell Transport and Royal Dutch's motion to dismiss for lack of personal jurisdiction (Docket Entry #4) be GRANTED.

The Clerk of the court shall enter this memorandum and recommendation and provide a true copy to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to 28 U.S.C. §636(b)(1)(C); General Order 80-5 (S.D. Tex.). Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual findings and legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, and to the chambers of the undersigned, Room 7007.

Signed at Houston, Texas, this 26th day of February, 1998.

MARY MILLOY
UNITED STATES MAGISTRATE JUDGE

APPENDIX C

Order on Plaintiffs' Motions to Compel Discovery and to Delay Rulings on Defendants' Motions to Dismiss Dated February 24, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ANNIE KELLY, *et al.*	§	
	§	
Plaintiffs,	§	
	§	CIVIL ACTION NO.
v.	§	H-97-2320
	§	consolidated with
	§	Civil Action No. H-97-2322
	§	
SYRIA SHELL	§	
PETROLEUM	§	
DEVELOPMENT, B.V.,	§	
et al.	§	
	§	
Defendants.	§	

ORDER ON PLAINTIFFS' MOTIONS TO COMPEL DISCOVERY AND TO DELAY RULING ON DEFENDANTS' MOTIONS TO DISMISS

This matter was referred by United States District Judge Vanessa D. Gilmore for pretrial management, under 28 U.S.C. §636(b)(1)(A) and (B). (Docket Entry #17, No. 97-2320). On July 25, 1997, a motion to dismiss was filed, jointly, by Defendants Al Furat Petroleum Company ("Al Furat"), Shell Transport and Trading, P.L.C. ("Shell Transport"), Syria Shell Petroleum Development B.V. ("Syria Shell"), and M.V. Koninklije Nederlandsche Petroleum Matssenappij a/k/a Royal

Dutch Petroleum Company ("Royal Dutch"), for lack of subject matter jurisdiction, under Rule 12(b)(1) of the Federal Rules of Civil Procedure, for lack of personal jurisdiction, under Rule 12(b)(2), for "insufficiency of process and insufficiency of service of process", under Rules 12(b)(4) and 12(b)(5), and for *forum non conveniens*. (Docket Entry #4). In tandem with that motion, Defendants also requested a stay of any discovery in this proceeding. (Docket Entry #33). Plaintiffs Kathy Strong, individually and as next friend for John Strong, Annie Kelly, and Jeannette Carpenter (collectively, "Plaintiffs"), in turn, have asked that discovery proceed on Al Furat's motion to dismiss for lack of subject matter jurisdiction, under the Foreign Sovereign Immunities Act ("FSIA"). (Docket Entry #72). Plaintiffs have also filed a motion to compel discovery on the issues of personal jurisdiction, and they ask the court to delay its ruling on all pending dispositive motions. (Docket Entry #82). The parties have filed numerous responses and replies to these motions. (Docket Entries #37, #84, #85, #86, #90, #94, #95, #97, and #98). After considering all of the pleadings filed to date, and the applicable law, Defendants' motion for a stay of discovery is GRANTED. (Docket Entry #33). Plaintiffs' motion to conduct discovery on whether jurisdiction exists under the FSIA is DENIED. (Docket Entry #72). Plaintiffs' motion to compel discovery on the issue of personal jurisdiction is DENIED, and the request to delay a ruling on Defendants' pending motions to dismiss is DENIED, as well. (Docket Entry #82).

Background

Many of the facts and procedural history concerning Plaintiffs' claims are set out in the memorandum and recommendation that was entered on October 7, 1997. (Docket Entries #31, #32, #34). Here, it is sufficient to note that this

case stems from a fire that occurred, on June 10, 1995, at an oil and gas well located in the Syrian Arab Republic. It is alleged that this fire caused the deaths of Martin J. Kelly ("Kelly"), Joseph A. Carpenter ("Carpenter"), and Danny Strong ("Strong"). (Plaintiffs' Third Amended Complaint ["Strong's Third Amended Complaint"], Docket Entry #89; and Plaintiffs Annie Kelly and Jeannette Carpenter's Second Amended Complaint ["Kelly and Carpenter's Second Amended Complaint"], Docket Entry #92). Plaintiffs contend that Al Furat, Syria Shell, Shell Transport, and Royal Dutch owned, operated, managed, or controlled the well site at issue. (Strong's Third Amended Complaint, p. 7; Kelly and Carpenter's Second Amended Complaint, p. 7). Plaintiffs contend that Al Furat, on behalf of Syria Shell, Shell Transport, and Royal Dutch, entered into contracts with two Texas companies, Boots & Coots, L.P., and Wright, Boots & Coots, L.L.C., to assist in efforts to bring the well "under control." (Exhibit B, Work Order dated May 3, 1995; Exhibit E, Contract No. C/5/01200, dated June 10. 1995, Docket Entry #19). At the time of their deaths, Kelly, Carpenter, and Strong were employed as oil well "blow-out specialists" by Boots & Coots, L.P.[1] (Kelly and Carpenter's First Amended Complaint, p. 4 ¶8, Docket Entry #43). Their widows, Annie Kelly, Jeannette Carpenter, and Kathy Strong, individually and as next friend of

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[1] It is not clear from this record whether Danny Strong was actually employed by Boots & Coots, L.P., Wright, Boots & Coots, L.L.C., or some other entity. (*See* Exhibit D, Plaintiffs' First Amended Original Petition in *Strong et al. v. Syria Shell Petroleum Development B.V. et al.*, No. 97-29262; Exhibit E, Plaintiffs' Third Amended Original Petition in *Strong et al. v. Boots & Coots Consulting, Inc. et al.*, No. 95-041929, Docket Entry #6).

John Strong, a minor (collectively, "Plaintiffs"), filed suit against these Defendants, originally, alleging claims for negligence and gross negligence in connection with that fire. (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9). In February of 1998, Plaintiffs amended their pleadings to add an allegation that Al Furat had breached is contracts with Wright, Boots & Coots, L.L.C. and Boots & Coots, L.P. (Strong's Third Amended Complaint, pp.9-10; Kelly and Carpenter's Second Amended Complaint, pp.9-10).

Al Furat is a "private non-profit making [and] non-asset owning" company that is incorporated under the laws of the Syrian Arab Republic. (Exhibit A, Declaration of Terje T. Olsen ["Olsen's Declaration"] ¶2, Docket Entry #6). Its principal place of business is in Syria. (Olsen Declaration ¶2). Al Furat was formed pursuant to Syrian government decree to "develop identified petroleum reserves in Development Lease Areas in the [Syrian Arab Republic]." (Olsen's Declaration ¶3).

Syria Shell is a Dutch corporation "with its registered office in the Hague, the Netherlands and with its principal place of business in Syria." (Exhibit F, Affidavit of Wouter G. van Dorp ["van Dorp Affidavit"] ¶2, Docket Entry #6). Syria Shell "is principally engaged in the prospecting for and the production of liquid and gaseous hydrocarbons and other minerals and participates in other companies which engage in similar activities in Syria." (Exhibit G, Declaration of Robbert van der Vlist ["van der Vlist Declaration"] ¶10, Docket Entry #6). "Syria Shell is one of two minority shareholders" in Al Furat. (van Dorp Affidavit ¶2).

Royal Dutch is a "holding company" that is "organized . . . under the laws of The Netherlands with its principal and only place of business in The Hague, The Netherlands." (van

der Vlist Declaration ¶¶2, 4). Shell Transport is also a "holding company" that is "organized . . . under the laws of England with its principal and only place of business in London, England." (Exhibit H, Declaration of Jyoti Munsiff ["Munsiff Declaration"] ¶¶2-3, Docket Entry #6). Royal Dutch and Shell Transport "together own, directly or indirectly, investments in various companies known collectively as the 'Royal Ducth/Shell Group of companies.'" (van der Vlist Declaration ¶3; Munsiff Declaration ¶3). Royal Dutch and Shell Transport are, reportedly, the "ultimate parent companies of Syria Shell." (*See* Brief in Support of Motion to Dismiss ["Defendants' Brief"], p.5, Docket Entry #5, van der Vlist Declaration ¶10; Munsiff Declaration ¶10).

In their joint motion to dismiss Plaintiffs' claims, Defendants argue that this court has no subject matter jurisdiction over Al Furat because that entity is immune from suit in the United States under FSIA. (Defendants' Motion to Dismiss and Motion for a More Definite Statement ["Defendants' Motion"], pp.1-2, Docket Entry #4). Relying on this position, Al Furat has resisted Plaintiffs' efforts at discovery on their claims. While this motion was pending, Plaintiffs filed a "motion to conduct discovery" and hope to pursue facts that they alleged are relevant to whether Al Furat is, in fact, entitled to the protection of the FSIA (Docket Entry #72).

Plaintiffs have been given opportunities to make the requisite showing that discovery is justified on Al Furat's status under the FSIA. (Docket Entries #84, #86, #90, #97, #98). More than on hearing has taken place in an effort to refine the factual and legal inquiries. (*See* Docket Entries #81, #87, and #99). In fact, the court did allow Plaintiffs to depose Johns Wright, of Wright, Boots & Coots L.L.C., in response to the

claim that he was able to provide pertinent information on these matters. (Docket Entry #81). For the reasons that follow, the court finds that Plaintiffs have not alleged "specific facts" which, if true, would show that Al Furat is not entitled to immunity from suit, under the FSIA, or that any exception applies that encroaches on that protection. *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.), *cert. denied*, 506 U.S. 956 (1992). In their briefs and arguments, Plaintiffs have not distinguished in any way the Fifth Circuit precedent which details the threshold showing that is required before discovery should be permitted. *Arriba*, 962 F.2d at 534. On this record, the court concludes that Plaintiffs have not shown that discovery is justified on whether Al Furat is entitled to immunity, or on whether an exception to immunity exists, pursuant to the FSIA and, therefore, the motion to conduct discovery on those issues is denied. (Docket Entry #72).

A. Discovery Under the FSIA

1. Sovereign Immunity

The FSIA provides the exclusive basis for federal jurisdiction over claims against foreign states and their "agents and instrumentalities". *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). The FSIA defines a "foreign state" as "a political subdivision of a foreign state or an agency or instrumentality of a foreign state". 28 U.S.C. § 1603(a). "An 'agency or instrumentality of a foreign state' means any entity -

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority whose shares or other ownership interest is owned by a foreign state or political subdivision thereof,

and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country."

28 U.S.C. § 1603(b)(1994). It is well established that the FSIA provides foreign states with immunity from suit, not merely from liability. *Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169, 172 (5th Cir. 1994)(citations omitted); *Gould, Inc. v. Pechiney Ugine Kuhlmann*, 853 F.2d 445, 451 (6th Cir. 1988). In addition, once it is determined that a defendant is a foreign state, under the FSIA, "[a]n exception to foreign sovereign immunity must exist to [support] subject matter jurisdiction." *Gould*, 853 F.2d at 450. Exceptions to immunity exist in the following circumstances: (1) "the foreign state has waived its immunity"; (2) " the action is based upon a commercial activity" by the foreign state; (3) the case involves "rights in property taken in violation of international law" or "rights in property in the United States acquired by succession or gift"; (4) suits for "money damages . . . against a foreign state for personal injury or death, or damage to or loss of property, occurring in the United States; (5) "an agreement made by the foreign state with or for the benefit of a private party to submit to arbitration" in the United States; and (6) a suit for "money damages . . . against a foreign state for personal injury or death that was caused by an act of torture, extrajudicial killing, aircraft sabotage, hostage taking, or the provision of material support or resources . . . for such act". 28 U.S.C. § 1605(a). "The foreign state bears the burden of persuasion on the issue of immunity under the FSIA, but one a *prima facie* showing of immunity has been made, the plaintiff seeking to litigate in the district court bears the burden of coming forward with facts

showing that an exception applies." *Moran*, 27 F.3d at 172 (*citing Walter Fuller Aircraft Sales v. Republic of the Philippines*, 965 F.2d 1375, 1383 (5th Cir. 1992)); *see also Brown v. Valmet-Appleton*, 27 F.3d 860, 862 n.7 (5th Cir. 1996)(citations omitted)).

For reasons set out in the memorandum and recommendations on Plaintiffs' motion to remand, and on Defendants' motion to dismiss for lack of subject matter jurisdiction, this court concludes that Al Furat has made a *prima facie* showing that it is "an organ of a foreign state or political subdivision thereof, or a majority whose shares or other ownership interest is owned by a foreign state or political subdivision thereof".[2] (*See* Memorandum and Recommendation dated October 7, 1997, Docket Entry #31). Plaintiffs now bear the burden to show that there is a "reasonable basis for assuming jurisdiction" before discovery on that issue will proceed. *Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990)(citing *Oppenheimer Fund, inc. v. Sanders*, 437 U.S. 340, 351 & n.13 (1978)). Although this

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The Strong Plaintiffs complain that they were not parties to the motion to remand because their case had not yet been consolidated with Kelly and Carpenter's. They argue, therefore, that they should not be bound by the ruling on that issue. (Docket Entry #90, p.2). The court notes, however, that the Strong Plaintiffs did have a response on file which addressed whether Al Furat was entitled to immunity under the FSIA, prior to the court's determination of the Kelly and Carpenter motion to remand. (Docket Entry #14 in C.A. No. 97-2322). The arguments and evidence in that response, as well as those included in Strong's supplemental pleadings on the issue of FSIA immunity have been considered fully. Based on a review of the entire record, the court concludes that Plaintiffs have presented no new information which requires a change to its earlier finding.

is understandably problematic for claimants, the United States Court of Appeals for the Fifth Circuit has addressed the decided "tension between permitting discovery" on a foreign sovereign's assertion of immunity, "and protecting a sovereign's or sovereign agency's legitimate claim to immunity from discovery." *Arriba Ltd. v. Petroleos Mexicanos*, 962 F.2d 528, 534 (5th Cir.), *cert. denied*, 506 U.S. 956 (1992). The Fifth Circuit noted that "[t]he potential conflict is not unlike that attendant to claims that challenge domestic government officals' qualified immunity from suit." *Id.* (*citing Anderson v. Creighton*, 483 U.S. 635 (1987)). In such instances, a plaintiff is "entitled conduct discovery for the limited purpose of establishing jurisdictional facts under the FSIA prior to any dismissal." *Santos v. Compagnie Nationale Air France*, 934 F.2d 890, 892 n.2 (7th Cir. 1991)(*citing Filus v. Lot Polish Airlines*, 907 F.2d 1328, 1332 (2d Cir. 1990). However, "[i]n light of the special problems posed by discovery abroad, district courts should ensure that a foreign litigant is not subject to unfair of abusive discovery." *McKesson Corp. v. Islamic Republic of Iran*, 137 F.R.D. 1, 3 (D.D.C. 1991)(*citing Societe Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S. 522, 556 (1987)). The Fifth Circuit has held, therefore, tht "discovery should be ordered circumspectly and only to verify allegations of specific facts crucial to an immunity determination" under the FSIA. *Arriba*, 962 F.2d at 534.

Plaintiffs insist that the evidence available does not show that Al Furat is owned by "a foreign sate of a political subdivision thereof" and entitled to immunity under 28 U.S.C. § 1603(b)(2), because "Syrian Petroleum Company does not control it." (Docket Entry #90, p.6; Docket Entry #98, p.2). Plaintiffs maintain that, "[a]t a minimum, discovery should be

allowed on other indicia of the 'ownership interest' by the various owners in Al Furat." (Docket Entry #90, p.6). In that regard, Plaintiffs "believe they have a fundamental right to cross-examine the individuals who have provided the evidence in support of the Defendants' motion to dismiss" and they have indicated that they wish to depose the following individuals: (1) the "operations manager" of Al Furat, Terje T. Olsen; (2) the "general manager" of Syria Shell, Wouter G. van Dorp; (3) the "general attorney" for Royal Dutch, Robbert van der Vlist; (4) the corporate secretary of Shell Transport, Jyoti Munsiff; (5) the "assistant secretary" for Shell Oil Company, S.J. Paul; (6) an employee of Wright, Boots & Coots, Larry Flak; and (7) the chief executive officer of the Syrian Petroleum Company, Dr. Eng Ahmad Mualla. (Docket Entries #84 and #86). Plaintiffs also seek deposition testimony from several "individuals who were involved in the actual well operations and in the management of the kill operations and relief wells", as follows: (1) a general manager with Al Furat, J.C. Darley; (2) a Shell employee, Willem Warmenhoven; (3) a "site manager" for Al Furat, C. Hans vanderZande; (4) the manger of a company known as "HSE", A. Gower-Jones; and (5) the "part owner of the entities which owned Wright, Boots & Coots", John Wright. (Docket Entries #84 and #86). Plaintiffs state, in addition, that they "may need" to depose the following individuals: (1) Y. Ladkani; (2) P.H. Velzehoer; and (3) H. Wijaheak. (Docket Entries #84 and #86).

In support of their request for discovery, Plaintiffs have provided a map of Syria which purports to show that the ISBA 123 well at issue was a "Shell interest." (Exhibit D, Chart of Competitor Activities, Docket Entry #90, p.6). Relying on this map, Plaintiffs argue that "[o]bviously, there are questions as to whether the Shell organization is dominant to such a degree

so as to render Al Furat not majority owned or controlled by a foreign state." (Docket Entry #90, p.6). Likewise, they have presented an "organization chart" which reportedly demonstrates the "chain of command for [the] relief operation" conducted at the ISBA-123 well site in Syria. (Exhibit A, ISB[A]-123 Relief Operations, Docket Entry #90, p.4). Plaintiffs contend that "many of the key named individuals" on this chart "have Dutch, not Syrian, surnames and are believed to be current or former employees or contractors within the Shell organization." (Docket Entry #90, P.4). Plaintiffs insist that these exhibits raise a "substantial issue as to whether the Al Furat organization is run by public employees or by individuals provided for and/or controlled by the private owners of Al Furat." (Docket Entry #90, p.4). They argue, therefore, that there is "little doubt" that discovery would uncover additional evidence to show that "the Al Furat organization has many current or former Shell employees or contractors playing significant roles within it." (Docket Entry #90, p.4). For that reason, Plaintiffs request that they "be allowed, at a minimum, discovery on issues of actual control, the financial arrangements between the parties, and the distribution of profits and proceeds, including the production of crude oil and gas." (Docket Entry #90, p.6).

Here, it is undisputed that Syria Shell has an interest in Al Furat. The evidence shows that Syrian Petroleum owns 50% of Al Furat's stock, and Syria Shell owns 31.25% of the stock (Docket Entry #5, p.9). The remaining 18.75% is owned by Deminex Syria, a German corporation. (Docket Entry #5, p.9). Even assuming for these purposes, without deciding, that Al Furat is not entitled to immunity based on its ownership by a foreign state or political subdivision, that does not end the inquiry in this case. Al Furat has presented evidence to show,

alternatively, that is it an organ of a foreign state, pursuant to the FSIA, and entitled to immunity for that reason. It follows, therefore, that even if an issue is present on the indicia of control by Shell, the map and the chart that Plaintiffs have presented are not sufficient to warrant a broad inquiry on Al Furat's financial arrangements, or the individuals involved in the "actual well operations", or information on the "distribution of profits and proceeds". *Arriba*, 962 F.2d at 534; *Gould*, 853 F.2d at 451. To allow discovery on that basis edges dangerously toward an unjustifiable "fishing expedition."[3] *McKesson*, 137 F.R.D. at 3 (citation omitted).

Al Furat has presented a sworn affidavit from Terje T. Olsen ("Olsen"), Al Furat's operations manager. (Exhibit A, Declaration of Terje T. Olsen ["Olsen Declaration"], Docket Entry #6). Olsen reports that Al Furat was "formed pursuant to a Government authorization decree" and that its "objective is to develop identified petroleum reserves in Development Lease

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In further support of their motion to conduct discovery on the issue of "Shell's dominance" of Al Furat, Plaintiffs point to a decision by the United States Tax Court in *Lansdown v. Commissioner of the Internal Revenue Serv.*, T.C. Memo. 1994-452, 1994 WL 483909 (U.S. Tax Ct.), *aff'd in part and rev'd in part*, 73 F.3d 373 (10th Cir. 1995)(Table op.). In that case, the issue before the tax court was whether the plaintiff was entitled to a "foreign earned income exclusion" under § 911(a) of the Internal Revenue Code. *Lansdown*, 1994 WL 483909. Plaintiffs argue that in *Lansdown*, the court found that employees of Al Furat received benefits from the "Royal Dutch Shell Group". (Hearing dated February 18, 1998). Plaintiffs rely on this finding to support discovery on their contention that Shell entities are in actual control of Al Furat. However, the *Lansdown* decision did not involve any issue of sovereign immunity and never addressed the implications fo the FSIA. That decision is not relevant to the claims and arguments before this court.

Areas in the [Syrian Arab Republic]." (Olsen Declaration ¶¶2-3). From this evidence, Al Furat has made a *prima facie* showing that it qualifies as an "organ of a foreign state", pursuant to 28 U.S.C. § 1603(b)(2), and is entitled to the protection of the statute on that basis.

In support of their request for discovery, Plaintiffs complain that "the only real evidence on the issue of whether [Al Furat] was created for a national purpose is the declaration of Terje Olsen, the Al Furat operations manager." (Docket Entry #90, p.3). Plaintiffs protest that "[i]t is completely unknown to what extent, if at all, Mr. Olsen can speak for the Syrian government, or whether any of his conclusory statements about the creation of Al Furat are correct." (Docket Entry #90, p.3). Plaintiffs insist that they "should be entitled, at a minimum, to obtain copies of all the relevant documentation creating [the] Al Furat Petroleum Company." (Docket Entry #90, p.3). Plaintiffs want to "be allowed to depose Mr. Olsen to determine the background and sources of some of the information contained in his statements in the declaration" and argue that they "should be entitled to obtain copies of the relevant documentation as well as have an opportunity to examine appropriate persons on the subject" of Al Furat's treatment under Syrian law. (Docket Entry #90, p.5).

Unfortunately, Plaintiffs have offered no reason to question whether Olsen is not credible or that, as Al Furat's operations manager, he is not qualified to testify about that company's structure. Nor have they shown that there is any support, in law, for a blanket disregard of the sworn statements of a declarant in the absence of such a question. Further, Olsen's declaration is supported by a sworn affidavit from Syrian Petroleum's chief executive officer, Dr. Eng. Ahmad Mualla, on that entity's ownership and treatment under Syrian

law. (Exhibit L, Declaration of Dr. Eng. Ahmad Mualla ["Mualla"], Docket Entry #6). The court concludes, therefore, that Plaintiffs request for discovery on this ground is without merit.

A plaintiff is entitled to discovery, under the FSIA, only if he pleads "specific facts" that are "crucial to an immunity determination." *Arriba*, 962 F.2d at 534. The discovery that Plaintiffs request, even if most fruitful to their claims, could not establish that a "reasonable basis for assuming jurisdiction" exists here in view of the evidence that Al Furat qualifies as an organ or instrumentality of the Syrian Arab Republic. *Filus*, 907 F.2d at 1332. Plaintiffs have not met their burden to show that the discovery they seek would defeat Al Furat's claim that it is a foreign state entitled to immunity under the FSIA, 28 U.S.C. § 1603(a)(2), and their motion to conduct discovery on that issue is denied (Docket Entry #72).

2. Exceptions under the FSIA

Plaintiffs contend that, even if the court finds that Al Furat is entitled to status as a foreign sovereign, "Al Furat's activities . . . fall within the commercial activity exception to the FSIA and", therefore, "Al Furat does not . . . enjoy immunity as provided by that statute." (Strong's Third Amended Complaint, p.11) Plaintiffs claim that Kelly, Carpenter, and Strong were killed by a fire at a Syrian oil and gas well, that resulted from "negligence and gross negligence by Defendants." (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9). Plaintiffs complain further that in Al Furat's "fail[ure] to comply with and enforce contractual obligations for safe-work practices", and in its "fail[ure] to warn the Plaintiffs that they would not enforce such practices, Al Furat breached its

contracts with Wright, Boots & Coots and Boots & Coots, L.P." (Strong's Third Amended Complaint, pp. 9-10; Kelly and Carpenter's Second Amended Complaint, p.9). Plaintiffs claim that Al Furat's "failure to comply with and enforce [these] contractual obligations was a proximate cause of the death of [Danny Strong, Martin Kelly, and John Carpenter]." (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9).

(a). Commercial Activity Exception

The FSIA provides that a foreign state is not immune from suit if it engages in commercial activity. 28 U.S.C. § 1605(a)(2). That exception is set out as follows:

> . . . in any case in which the action is based upon a commercial activity carried on in the United States by the foreign state; or
> upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or
> upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

28 U.S.C. §1605(a)(2). In a "memorandum regarding the applicability of the commercial activity exception", filed February 19, 1998, Plaintiffs insist that this action is based both "upon a commercial activity carried on in the United Staets" and "upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere" and so the commercial activity exception divests Al Furat of immunity. (Docket Entry #97 and #98). Al Furat disputes, however, whether Plaintiffs' action is truly "based upon" a

"commercial activity". (Docket Entry #94, p.3).

"Commercial activity" is defined under the FSIA as follows:

> either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose.

28 U.S.C. § 1603(d). The United States Supreme Court has explained that the FSIA "largely codifies the so-called 'restrictive' theory of foreign sovereign immunity first endorsed by the State Department in 1952." *Saudi Arabia v. Nelson*, 507 U.s. 349, 359 (1993) (*citing Weltover*, 504 U.S. at 612). "Under the restrictive, as opposed to the 'absolute' theory of foreign sovereign immunity, a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*0, but not to those that are private or commercial in character (*jure gestionis*)." *Nelson*, 507 U.S. at 361 (*citing Verlinden*, 461 U.S. at 487); *Alfred Dunhill of London, Inc. v. Republic of Cuba*, 425 U.S. 682 (1976)). In *Republic of Argentine v. Weltover, Inc.*, the Court held that, under this "restrictive theory" of sovereign immunity, a foreign state "engages in commercial activity under the [FSIA] where it exercises only those powers that can also be exercised by private citizens' as distinct from those 'powers peculiar to sovereigns." 504 U.S. 607, 614 (1992); *see also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 451 (1987). "Put differently, a foreign state engages in commercial activity for purposes of the restrictive theory only where it acts 'in the manner of private player within the market.'" *Weltover*, 504

U.S. at 614 (citation omitted). The Court has emphasized that "whether a [foreign] state acts 'in manner of a private party is a question of behavior, not motivation", as follows:

> [B]ecause the [FSIA] provides taht the commercial character of the act is to be determined by reference to its nature rather than its 'purpose,', the question is not whether the foreign government is acting with a profit motive or instead with the aim of fulfilling uniquely sovereign objectives. Rather, the issue is whether he particular actions that the foreign state performs (whatever the motive behind them) are the *type* of actions by which a private party engages in 'trade and traffic or commerce.'

Nelson, 507 U.S. at 360-61 (*quoting Weltover*, 504 U.S. at 614) (emphasis in original).

Here, Plaintiffs insist, and this court does not necessarily disagree, that the contracts entered into with Wright, Boots & Coots, L.L.C. and Boots & Coots L.P. "make clear that the activities in question by Al Furat are commercial in nature." (Docket Entry #90, p.8). Those contracts were "[f]or the provision of [b]lowout response and [w]ell [k[illing [s]ervices." (Exhibit E, Work Order for Boots & Coots L.P. dated May 5, 1995 ["Work Order"]; Exhibit F, Contract No. C/5/01200 between Al Furat Petroleum Company and Wright Boots and Coots dated June 10, 1995 ["Contract No. C/5/01200"], Docket Entry #90). Plaintiffs point out that Al Furat was obligated to monitor all of the work performed and to "stop or suspend any item of work" when necessary. (Contract No. C/5/01200, § 4.4.1). In addition, Al Furat was responsible for safety standards and had "complete authority,

dominion and control over the well site, the well involved, and the drilling and related equipment there located . . ." (Contract No. C/5/01200 § 2.21; Work Order ¶2). Plaintiffs claim that they have suffered "harm based upon Al Furat's failure to discharge its obligations properly under such contracts." (Docket Entry #90, p.8). They argue, therefore, that these factors fit within the commercial activity exception and so Al Furat is not entitled to sovereign immunity under the FSIA. (Docket Entry #90, p.8). Plaintiffs contend that, in an effort to establish that the commercial activities exception applies, they "should, at a minimum, be entitled to discovery relating to the contracts, the rights and responsibilities of the various parties under these contracts, and the effect of the contracts and activities of Al Furat in the United States." (Docket Entry #90, p.8). However, accepting as true all of Plaintiffs' allegations that Al Furat was engaged in commercial activity, those facts do not, in and of themselves, trigger the necessity for additional discovery on this point.

It is true that "contracts for the procurement of goods and services" are a commercial activity, "rather than governmental in nature." *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1384 (5th Cir. 1992) (*citing Weltover*, 504 U.S. 607 (1992)(citations omitted). The legislative history of the FSIA also details that "the making of 'a single contract' in the United States can support" a finding that the commercial activity exception applies. *Id.* (*quoting* H.R. Report No. 1487, 94th Cong., 2nd Sess. 16, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6615). Under the commercial activity exception, if it is shown that a contractual duty "ar[ises] from commercial activity in the United States, then United States courts have [subject matter] jurisdiction, even if the acts that breached the duty occurred elsewhere." *Santos v.*

Compagnie Nationale Air France, 934 F.2d 890, 893 (7th Cir. 1991). It follows that the breach of a contract, entered into in the United States, "provides [subject matter] jurisdiction for a claim for breach of that agreement." *Santos*, 934 F.2d at 894. "By contrast, however, a foreign government is not susceptible to subject matter jurisdiction in the courts of the United States for breaching a contract that was "excused in the [foreign] country". *Id.* (*citing Zedan v. Kingdom of Saudi Arabia*, 849 F.2d 1511, 1512 (D.C. Cir. 1988)).

But, here, the evidence is clear that the contracts at issue were executed in the cities of Omar and El Ibsa in Syria. (Work Order; Contract No. C/5/01200). For that reason, these contracts cannot form the basis for subject matter jurisdiction in the United States, even under the commercial activity exception to the FSIA. *Santos*, 934 F.2d at 894; *Zedan*, 849 F.2d at 1512-14.

Further, a review of the two contracts upon which Plaintiffs rely shows that the parties to those agreements are Al Furat, Boots & Coots L.P., and Wright Boots & Coots, L.L.C. (Contract No. C/5/01200; Work Order). Neither Boots & Coots, L.P. nor Wright, Boots & Coots, L.L.C. have been joined in this dispute. Nor were Plaintiffs subject to the rights and obligations that are set out in those written agreements. Plaintiffs appear to argue that they are "third-party beneficiaries" of these contracts and, because the injuries complained of were proximately caused by Al Furat's alleged "failure to comply with and enforce [its] contractual obligations", they have standing to sue Al Furat for its breach. (Kelly and Carpenter's Seconded Amended Complaint, p.2, 8-9; Strong's Third Amended Complaint, p.2, 9-10). However, Texas law is settled that "[a] third party can only recover if the contracting parties intended to benefit that party, 'and only if

the contracting parties entered into the contract directly and primarily for the third party's benefit.'" *Loyd v. Eco Resources, Inc.*, 956b S.W.2d 110, 134 (Tex. App.-Houston[14th Dist.] 1997, n.w.h.)(*quoting Dorsett Bros. Concrete Supply, Inc. v. Safeco Title Ins. Co.*, 880 S.W.2d 417, 421 (Tex. App.-Houston [14th Dist.] 1993, writ denied)). The mere fact that a person is "affected by the parties' conduct, or that he 'may have a substantial interest in a contract's enforcement, does not make him a third-party beneficiary'", as a matter of law. *Loyd*, 956 S.W.2d at 134 (*quoting Merrimack Mut. Fire Ins. Co. v. Allied Fairbanks Bank*, 678 S.W.2d 574, 577 (Tex. App.-Houston [14th Dist.] 1984, writ ref'd n.r.e.)). It does not appear, from these facts, that Plaintiffs are third-party beneficiaries to the contracts between Al Furat and Boots & Coots L.P. and Wright, Boots & Coots L.L.C. and they have no right to enforce any term, or to recover damages, because of an alleged breach of those agreements.

Moreover, a careful review of the pleadings reveals that Plaintiffs' suit actually sounds in tort, and not in contract. Plaintiffs complain of the following incidents of "misconduct in operating the well":

(1) failure to provide adequate water at the well site;

(2) failure to provide [an] adequate water pump at the well site;

(3) failure to secure alternative sources for water at the well site;

(4) failure to approve the expenditure of equipment necessary to perform well control operations;

(5) failure to provide adequate, qualified personnel to perform operations at the well control site;

(6) failure to provide adequate well control

planning and procedures through qualified management;

(7) failure to have any preplanned contingency for escape for those working on the well site;

(8) failure to employ other contractors with the necessary expertise to assist in the well control operations;

(9) failure to maintain the well-site which was under their dominion and control in a reasonably safe condition;

(10) failure to monitor the work practices of persons working at the well-site in order to ensure that contractors were complying with contractually required work practices and safety standards;

(11) failure to monitor relevant work and to stop said work when appropriate;

(12) failure to properly set, implement, and enforc[e] safety standards for contractors on the job.

(Strong's Third Amended Complaint, pp. 7–8; Kelly and Carpenter's Second Amended Complaint, pp. 7-8). Plaintiffs alleged, expressly, that these acts constitute negligence and gross negligence. (Strong's Third Amended Complaint, p.9; Kelly and Carpenter's Second Amended Complaint, p.9). While Plaintiffs have recently added breach of contract allegations against Al Furat, for "failing to enforce safe-work practices" and "failing to warn that they would not enforce such practices", it is clear that, in truth, their claims stem from the personal injuries resulting from any negligent acts or omissions. "Those torts, and not the arguably commercial activities that preceded their commission, form the basis for [Plaintiffs'] suit." *Saudi Arabia v. Nelson*, 507 U.S. 349, 358 (1993). "To give jurisdictional significance to this feint of

language would effectively thwart the [FSIA's] manifest purpose to codify the restrictive theory of sovereign immunity." *Id.* at 363.

Again, Plaintiffs have not met their burden to alleged "specific facts" which, if found, would establish that the commercial activity exception to sovereign immunity under the FSIA exists. *Arriba*, 962 F.2d at 534; *Filus*, 907 F.2d at 1332. Therefore, the motion to conduct discovery on that issue is denied. (Docket Entry #72).

(b) Waiver

Alternatively, Plaintiffs claim that Al Furat has waived its immunity by "entering into contracts which call for the enforcement of . . . obligations in Houston, Harris [C]ounty, Texas." (Strong's Third Amended Complaint, p.11; Kelly and Carpenter's Second Amended Complaint, p.11). Plaintiffs argue that because that act "comtemplat[es] the participation of the American Courts", Al Furat should be subject to suit in this forum. (Docket Entry #19, p.19). Plaintiffs have made no argument that any discovery is required on this exception. As Plaintiffs have not demonstrated "specific facts" which, if true, would show that this exception to immunity applies, discovery on this ground is denied. *Arriba*, 962 F.2d at 534; *Filus*, 907 F.2d at 1332.

B. Discovery of Facts to Support Personal Juridiction in This Forum

Defendants Syria Shell, Royal Dutch, and Shell Transport contend that this court lacks personal jurisdiction over them and, therefore, Plaintiffs' action must be dismissed, under 12(b)(2) of the Federal Rules of Civil Procedure. (Defendants' Motion, p.2). Each of these Defendants claims that it does not have the requisite minimum contacts wit the State of Texas that would allow a proper exercise of

jurisdiction in this forum. (Defendants' Motion, p.2). Plaintiffs argue that a dismissal for lack of personal jurisdiction would be premature at this time and that they should be allowed to conduct discovery on whether personal jurisdiction exists.

"While discovery on the question of personal jurisdiction is sometimes appropriate when there is a motion to dismiss for lack of jurisdiction, plaintiffs must first make a threshold showing that there is some basis for the assertion of jurisdiction." *Monsanto Int'l Sales Co. v. Hanjin Container Lines, Ltd.*, 770 F.Supp 832, 838 (S.D. NY 1991), *aff'd without written op.*, 962 F.2d 4 (2d Cir. 1992)(citations omitted). The Firth Circuit has recognized that "[w]hen a defendant challenges personal jurisdiction, courts generally permit depositions confined to the issues raised in the motion to dismiss." *Wyatt v. Kaplan*, 686 F.2d 276, 273 (5th Cir. 1982)(citation omitted). However, the court has held that "[t]he decision not to permit depositions on a motion to dismiss for lack of personal jurisdiction is specifically one for the trial court's discretion and 'such discretion will not be disturbed ordinarily unless there are unusual circumstances showing a clear abuse.'" *Id.* (citations omitted). "Discovery on matters of personal jurisdiction . . . need not be permitted unless the motion to dismiss raises issues of fact." *Id.* "When the lack of personal jurisdiction is clear, discovery would serve no purpose and should not be permitted." *Id.*

For the reasons discussed below, Plaintiffs have not shown that the discovery they request is relevant to a proper exercise of personal jurisdiction in this forum. Because discovery would not add "any significant facts", it should not be allowed. *Wyatt*, 686 F.2d at 273 (*citing Washington v. Norton Mfg.*, 588 F.2d 441, 447 (5th Cir.), *cert. denied*, 442

U.S. 942 (1979).

1. Personal Jurisdiction

"When a nonresident defendant presents a motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing the district court's jurisdiction over the nonresident." *Alfred v. Moore & Patterson*, 117 F.3d 278, 281 (5th Cir. 1997) (citations omitted). *Gundle Lining Const. v. Adams County Asphalt, Inc.*, 85 F.3d 201, 204 (5th Cir. 1996); *Wilson v. Belin*, 20 F.3d 644, 646 (5th Cir.), *cert. denied*, 513 U.S. 930 (1994). Before the court can properly exercise jurisdiction over the nonresident defendants here, two threshold requirements must be satisfied. First, it must be shown that the nonresident defendants purposely availed themselves of the benefits and protections of the forum state by establishing "minimum contacts" with it. *Gundle Lining*, 85 F.3d at 204 (*citing International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). A defendant's conduct and connection with the forum must be such that it should reasonably anticipate being haled into court in the forum state. *Gundle Lining*, 85 F.3d at 204 (*citing World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 296 (1980)). Second, there must be a showing that an exercise of such jurisdiction over the nonresident defendants will not offend "traditional notions of fair play and substantial justice." *Id.*; *Belin*, 20 F.3d at 647 (*citing Asahi Metal Indus. Co. v. Superior Court of California*, 480 U.S. 102, 113 (1987)) (citations omitted).

Plaintiffs' only contention here is that this court may exercise specific personal jurisdiction over Syria Shell, Shell Transport, and Royal Dutch. (Kelly and Carpenter's Second Amended Complaint, pp.2-3, 10; Strong's Third Amended Complaint, pp.2-3, 10). Defendants insist, however, that neither specific nor general personal jurisdiction exists.

(Docket Entry #5, pp.13-16).

(a) Specific Jurisdiction

One who has "purposely directed his activities at residents of the forum" may find himself subject to the specific jurisdiction of courts sitting in that state. *Burger King Corp. v. Rudzewicz*, 471 U.S. 472, 472 (1985)(*citing Keeson v. Hustler Magazine, Inc.*, 465 U.S. 770, 774 (1984)). "[W]ith respect to interstate contractual obligations . . . parties who 'reach beyond one state and create continuing relationships and obligations with citizens of another state' are subject to regulation and sanctions in the other state for the consequences of their activities." *Burger King*, 471 U.S. at 473 (*quoting Travelers Heath Ass'n v. Virginia*, 339 U.S. 643, 647 (1950)). To exercise specific jurisdiction, properly, "the court must examine the relationship among the defendant, the forum, and the litigation to determine whether maintaining the suit offends traditional notions of fair play and substantial justice." *Gundle Lining*, 85 F.3d at 205 (*citing Shaffer v. Heitner*, 433 U.S. 186, 204 (1977)). The fact that a nonresident defendant is physically absent from the forum state does not, alone, determine whether the forum can exercise personal jurisdiction over him. *Burger King*, 471 U.S. at 476. On the other hand, the mere fact that a contract was executed in the forum state is, in itself, insufficient to establish the necessary "minimum contacts." *Id.* at 478.

Plaintiffs have the burden to establish the court's jurisdiction over the foreign Defendants in this action. *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1067 (5th Cir. 1992). Plaintiffs contend that specific personal jurisdiction is present because Al Furat was acting as the "agent" or "alter ego" of Syria Shell, Shell Transport, and Royal Dutch, when it entered into contracts for well control

services with Boots & Coots L.P., and Wright, Boots & Coots, L.L.C., both Texas companies. (Kelly and Carpenter's Second Amended Complaint, pp.2-3, 10; Strong's Third Amended Complaint, pp.2-3, 10). Plaintiffs argue that these isolated contacts by Al Furat with the State of Texas are attributable to Syria Shell, Shell Transport, and Royal Dutch, and so this court may exercise specific personal jurisdiction over these foreign defendants. (Kelly and Carpenter's Second Amended Complaint, p.2; Strong's Third Amended Complaint, pp.2). Because the current allegations contain no mention of any direct contact with the forum by Syria Shell, Shell Transport, or Royal Dutch, Plaintiffs implicitly concede that these Defendants had no such direct contacts in Texas. (*See* Kelly and Carpenter's Second Amended Complaint, Docket Entry #92; Strong's Third Amended Complaint, Docket Entry #89). Personal jurisdiction over these Defendants can exist only if Al Furat's contacts can be attributed to them. *Gundle Lining*, 85 F.3d at 208-09; *Villar*, 990 F.2d at 1493; *Dalton v. R & W Marine, Inc.*, 897 F.2d 1359, 1361 (5th Cir. 1990); *Southmark Corp. v. Life Investors, Inc.*, 851 F.2d 763 (5th Cir. 1988); *Hargrave v. Fibreboard Corp.*, 710 F.2d 1154, 1159 (5th Cir. 1983); *Walker v. Newgent*, 583 F.2d 163, 166-67 (5th Cir. 1978), *cert. denied*, 441 U.S. 906 (1979); *Cousteau*, 495 F.2d at 492-493. The United States Supreme Court has held that foreign agencies and instrumentalities are to be accorded a presumption of independent status. *First Nat'l City Bank v. Banco Para El Comercio Exterior de Cuba ["Bancec"]* 462 U.S. at 627, 633; *Walter Fuller Aircraft Sales, Inc. v. Republic of the Philippines*, 965 F.2d 1375, 1381 (5th Cir. 1992); *Gabay v. Mostazafan Found. of Iran*, 151 F.R.D. 250, 253 (S.D. NY 1993). The Court detailed two situations in which that presumption might be overcome: (1) where "a corporate entity

is so extensively controlled by its owner that a relationship of principal and agent is created"; or (2) where recognition of the separate identity of the agency or instrumentality "would work fraud or injustice." *Bancec*, 462 U.S. at 629. "[W]here, as here, jurisdictoin depends on an allegation that the particular defendant was an agent of the sovereign, the plaintiff bears the burden of proving this relationship." *Arriba*, 962 F.2d at 534 (citations omitted). It seems that these Plaintiffs are pursuing claims that are the mirror-image of the facts present in *Bancec*. It is alleged here that the sovereign was acting as an agent for other, private entities. Plaintiffs argue that Al Furat's isolated contacts with the State of Texas can be attributed to Syria Shell, Shell Transport, and Royal Dutch, and so this court may exercise specific personal jurisdiction over the foreign defendants, as ell. (Kelly and Carpenter's Second Amended Complaint, p.2; Strong's Third Amended Complaint, pp.2).

Plaintiffs argue, specifically, that Al Furat recruited Wright, Boots & Coots, L.L.C. and Boots & Coots, L.P. for employment in Syria, and that the Texas long arm statute allows an exercise of specific personal jurisdiction in such an instance. (Docket Entry #19, pp.10-13; Hearings on January 29, 1998 and February 18, 1998). The Texas long-arm statute does permit an exercise of personal jurisdiction over nonresidents that do business in the forum. A nonresident is "doing business" in Texas if it engages in any of the following actions:

> (1) contracts by mail or otherwise with a Texas resident and either party it so perform the contract in whole or in part in this State;
>
> (2) commits a tort in whole or in part in this state; or
>
> (3) recruits Texas residents, directly, or through an

intermediary located in this state, for employment inside or outside the state.

TEX. CIV. PRAC. & REM. CODE ANN. § 17.042

In light of Plaintiffs' arguments, Defendants respond that neither these Plaintiffs, or the decedents, were ever specifically employed or recruited by Al Furat. (Hearing on February 18, 1998). Instead, those hiring details were executed by one of the non-parties, Wright, Boots & Coots L.L.C. or Boots & Coots, L.P. (Work Order; Contract No. C/5/01200). Because neither Boots & Coots, L.P. nor Wright, Boots & Coots, L.L.C. are parties to this dispute, it is unclear whether their actions have any colorable impact on this jurisdictional dispute. Plaintiffs have provided no case law to support this aspect of their argument on a proper exercise or personal jurisdiction based on the recruitment of Texas residents. Instead, they contend that Plaintiffs are "third-party beneficiaries" of the contracts with Wright, Boots & Coots L.L.C. and Boots & Coots L.P. and that the injuries complained of are a proximate result of Al Furat's "failure to comply with and enforce [its] contractual obligations". (Kelly and Carpenter's Second Amended Complaint, p. 2, 8-9; Strong's Third Amended Complaint, p.2, 9-10; Docket Entry #90, p.8). However, as noted, it is apparent that the parties to the contracts "intended to benefit" these Plaintiffs, and so they have no right to recover from Al Furat for a breach, if any, of those agreements. *Loyd*, 956 S.W.2d at 134 (citations omitted).

Further, a review of the contracts, which Plaintiffs claim are the basis for an exercise of specific jurisdiction, shows that they were both executed in Syria. (*See* Olsen Declaration ¶¶6-8; Exhibit E, Work Order dated May 3, 1995; Exhibit F, Contract No. C/5/01200 dated June 10, 1995, Docket

Entry #90). More importantly, it was agreed that the contracts are to be governed by Syrian law. (Exhibit F, Contract No. C/5/01200 dated June 10, 1995, Art. 10, 11, Docket Entry #90). The Fifth Circuit has "recognized that the place of contracting and the law governing the contract, while not necessarily determinative, are relevant factors for determining purposeful activity." *Jones*, 954 F.2d at 1069 (*citing Southwest Offset, Inc. v. Hudco Publ'g Co.*, 622 F.2d 149, 152 (5th Cir. 1982)). Although Al Furat undeniably agreed to make pyaments to Boots & Coots L.P. and Wright Boots & Coots in Houston, Texas, and to provide indemnification to those companies if loss or damage occurred in the performance of the agreements, the well control services that are the subject of the contracts were to be performed in Syria. (Exhibit B, Work Order dated May 3, 1995; Exhibit E, Contract No. C/5/01200 dated June 10, 1995, Docket Entry #19). The Fifth Circuit has held, in like circumstances, that if the "material performance" of a contract occurs outside the forum, the fact that payments were mailed into the forum "does not weigh heavily" in the determination of whether an exercise of specific personal jurisdiction is proper. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 778 (5th Cir. 1986), *cert. denied*, 481 U.S. 1015 (1987)(citations omitted).

Assuming for these purposes, but not deciding, that Al Furat is found to be the alter ego of Syria Shell, Shell Transport, and Royal Dutch, its isolated act in contracting with a Texas company is not sufficient to establish specific personal jurisdiction over these Defendants. *Burger King*, 471 U.S. at 476; *Belin*, 20 F.3d at 649; *Jones*, 954 F.2d at 1069; *Holt*, 801 F.2d at 778; *Hydrokinetics*, 700 F.2d at 1029-30. It is true, as Plaintiffs argue, that "[a] single act by the defendant directed at the forum state . . . can be enough to confer [specific] personal

jurisdiction *if* that acts gives rise to the claim being asserted." *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993)(citation omitted)(emphasis added). But it is likewise well settled that, "when the act or transaction being sued upon is unrelated to the defendant's contracts with the forum state, personal jurisdiction does not exist unless the defendant has sufficient 'continuous and systematic contacts' with the forum state to support an exercise of 'general jurisdiction.'" *Id.* It is important to note that Plaintiffs' claims here center on alleged breaches, acts, and omissions that were committed at the well site in Syria. (Kelly and Carpenter's Second Amended Complaint, p.9; Strong's Third Amended Complaint, pp.9-10).

Finally, it must be noted that Plaintiffs were allowed to take John Wright's deposition to supplement their discovery on jurisdictional issues and allow them to respond more fully to Defendants' motions to dismiss. Plaintiffs have not advised the court what additional discovery is needed in regard to Al Furat's contacts with the forum. They insist that specific personal jurisdiction is proper based on Al Furat's contracts with Wright, Boots & Coots L.L.C. and Boots & Coots L.P. (Kelly and Carpenter's Second Amended Complaint, pp.2-3, 10; Strong's Third Amended Complaint, pp.2-3, 10). They argue only that Al Furat's acts in contracting, making payments, and agreeing to indemnify those Texas companies are sufficient to support a proper exercise of specific personal jurisdiction in this forum. But those contracts are in evidence already and the court accepts as true all of Plaintiffs' allegations concerning them. The court must stress, however, that Plaintiffs' claims against these foreign Defendants clearly sound in tort and specific personal jurisdiction must arise from the acts or omissions alleged to have caused the harm.

Although Plaintiffs have alleged, as "third-party beneficiaries", a breach of contract claim, they do not have the standing to enforce those agreements.

Because the deaths of Kelly, Carpenter, and Strong are not related to Al Furat's activities in the United States, Plaintiffs must be able to demonstrate, alternatively, that Syria Shell, Shell Transport, and Royal Dutch have "sufficient 'continuous and systematic contacts' with the forum state to support an exercise of 'general jurisdiction.'" *Ruston*, 9 F.3d at 419. For the reasons that follow, Plaintiffs have not made this alternative showing.

(b). General jurisdiction

"[W]here the defendant's forum activities are continuing and systematic, jurisdiction may be proper without a relationship between a defendant's particular act and cause of action." *Jones v. Petty-Ray Geophysical Geosource, Inc.*, 954 F.2d 1061, 1068 (5th Cir.), *cert. denied*, 506 U.S. 867 (1992)(*citing Helicopteros*, 466 U.S. at 414 n.9). When general jurisdiction is alleged, the inquiry is more broad and demanding and requires that a greater amount of substantial activities in the forum state be shown. *Jones*, 954 F.2d at 1068. More than an occasional business transaction is required. *Polythane Systems, Inc. v. Marina Ventures Int'l Ltd.*, 993 F.2d 1201, 1205 (5th Cir. 1993). A greater degree of contact is required with the forum because the state has no direct interest in the cause of action. *Bearry v. Beech Aircraft Co.*, 818 F.2d 370, 374 (5th Cir. 1987)(*citing Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 447-48 (1952)).

Syria Shell, Shell Transport, and Royal Dutch insist that an exercise of general jurisdiction is not proper, as a matter of law, because they have never had "systematic and continuous" contacts with Texas. (Docket Entry #5, p.15). In support of

this contention, Syria Shell, Shell Transport, and Royal Dutch have presented the following evidence:

> (1) Syria Shell, Shell Transport, or Royal Dutch are not incorporated under the laws of the United States, and none of those entities has a principal place of business in the United States.
>
> (2) Syria Shell, Shell Transport, or Royal Dutch do not have a registered agent for service of process in the State of Texas, nor are they required to.
>
> (3) Syria Shell, Shell Transport, or Royal Dutch do not reside in, or maintain offices in, the State of Texas.
>
> (4) Syria Shell, Shell Transport, or Royal Dutch do not have employees or agents doing business on t heir behalf in the State of Texas.
>
> (5) Syria Shell, Shell Transport, or Royal Dutch have not sold goods or services, or contracted to sell goods or services, in Texas, nor have thy committed any tort, in whole or in part, within the State of Texas.

(van der Vlist Declaration ¶¶2, 5; Munsiff Declaration ¶5; van Dorp Declaration ¶¶2, 4).

Plaintiffs' allegations have not controverted this evidence in any way, nor have they raised any issue which triggers the need for discovery on this issue. They have, therefore, failed to make a showing that Al Furat, Syria Shell, Shell Transport, or Royal Dutch have "substantial" or "continuous and systematic" contacts with the forum that

would warrant an exercise of general jurisdiction over them. *Ruston Gas Turbines, Inc. v. Donaldson Co.*, 9 F.3d 415, 419 (5th Cir. 1993)(citation omitted). The court notes as well that, even had the requisite contacts been shown to exist, it is doubtful that due process considerations would otherwise support an exercise of specific or general jurisdiction over these foreign defendants.

2. Fair Play and Substantial Justice

The second element required to establish a proper exercise of personal jurisdiction is proof that, in doing so, the court would not "offend traditional notions of fair play and substantial justice" in accord with the due process clause of the United States Constitution. *Belin*, 20 F.3d at 647 (citations omitted). If a defendant has been found to have purposefully directed his actions toward the forum state, then that defendant has the burden to present "a compelling case that the presence of some other considerations would render jurisdiction unreasonable." *Burger King*, 471 U.S. at 477. Typically, courts consider the following factors in making this determination:

1. the burden on the defendant;
2. the forum state's interests in adjudicating the dispute;
3. the plaintiff's interest in maintaining convenient and effective relief;
4. the interstate judicial system's interest in obtaining the most efficient resolution of controversies;
5. the shared interest of the several states in furthering fundamental substantive social policies.

Fernandez, 844 F.2d at 284; *Burger King*, 471 U.S. at 477.

Here, Syria Shell, Shell Transport, and Royal Dutch argue that an exercise of personal jurisdiction would be unfair because "none have purposefully interjected themselves into Texas, and all the events underlying the incident made the basis of this suit took place outside of" the forum. (Docket Entry #5, p.17). Syria Shell, Shell Transport, and Royal Dutch maintain that "because neither the incident made the basis for this lawsuit nor any of the conduct relevant to this action occurred in Texas, the majority of the witnesses and evidence will be located outside the state." (Docket Entry #5, p.17). "Thus, not only would these Defendants be forced to travel great distances to defend the action in Texas, documents and witnesses would have to be transported here from Syria, The Netherlands, and England." (Docket Entry #5, pp. 17-18). Syria Shell, Shell Transport, and Royal Dutch contend that "[i]t would be inefficient and burdensome to conduct discovery and a trial in Texas when all the witnesses and evidence are far outside the state." (Docket Entry #5, p.18). Syria Shell, Shell Transport, and Royal Dutch argue, therefore, that "the burden on the[se] overseas Defendants, who are located in Syria, The Netherlands, and England, in having to defend themselves in Texas would be great." (Docket Entry #5, p.17).

The Fifth Circuit has recognized that "Texas has no special interest in granting relief to its citizens against a foreign corporation on a cause of action that arose under the laws of a foreign government for conduct outside the United States." *Jones*, 954 F.2d at 1070 (*citing Reich v. Signal Oil & Gas Co.*, 409 F.Supp. 846, 851 (S.D. Tex. 1974), *aff'd without written op.*, 530 F.2d 974 (5th Cir. 1976)). Considering the evidence and the arguments as a whole, Plaintiffs have not satisfied their threshold burden to show that Syria Shell, Shell Transport, and Royal Dutch have the requisite "minimum contacts" with the

forum state to allow the court a proper exercise of personal jurisdiction. Even had those minimum contacts been established, Syria Shell, Shell Transport, and Royal Dutch's connection with this forum is so remote that it would be unfair and unreasonable to maintain the suit here. *Jones*, 954 F.2d at 1069-70. As Defendants point out, Syria Shell, Shell Transport, and Royal Dutch's connections with Texas are nonexistent. (van der Vlist Declaration ¶¶2, 5; Munsiff Declaration ¶5; van Dorp Declaration ¶¶2, 4). A review of Al Furat's contracts with Boots & Coots, L.P. and Wright, Boots & Coots, L.L.C., reveals no justification for an exercise of personal jurisdiction, in this court, over those other entities. Plaintiffs have failed to make a *prima facie* case that either general or specific personal jurisdiction exists in this instance. As this required showing is absent, Plaintiffs are not entitled to discovery on whether jurisdiction is proper in this forum. *Monsanto*, 770 F.Supp. at 838. Accordingly, Plaintiffs' motion to conduct discovery is denied (Docket Entry #82) and Defendant's motion to stay discovery is granted. (Docket Entry #33).

Because Plaintiffs are not entitled to the discovery on this issue, their request for a delay in ruling on Defendants' pending motions to dismiss is, likewise, denied. (Docket Entry #82).

IT IS SO ORDERED.

The Clerk of the court shall enter this order and provide a true copy to the respective parties who will then have ten (10) days from the receipt of it to file written objections thereto, pursuant to Rule 72 of the Federal Rules of Civil Procedure, 28 U.S.C. § 636(b)(1)(C), and General Order 80-5, S.D. Texas. Failure to file written objections within the time period provided shall bar an aggrieved party from attacking the factual

findings or legal conclusions on appeal.

The original of any written objections shall be filed with the United States District Clerk, P.O. Box 61010, Houston, Texas 77208; copies of any such objections shall be delivered to the chambers of Judge Vanessa D. Gilmore, and to the chambers of the undersigned, Room 7007.

Signed at Houston, Texas this 24th day of February, 1998.

MARY MILLOY
UNITED STATES MAGISTRATE JUDGE